



Indigent Defense Task Force Report

**Principles and Standards for Counsel In
Criminal, Delinquency, Dependency and
Civil Commitment Cases**

Contents

Preface	3
Forward	5
Principles	7
General Principles for Counsel In Criminal, Delinquency, Dependency And Civil Commitment Cases	
Performance Standards	
Chapter 1	9
General Standards For Representation In <i>All</i> Criminal, Delinquency, Dependency And Civil Commitment Cases	
Performance Standards	
Chapter 2	13
Specific Standards For Representation In <i>Criminal And Juvenile</i> <i>Delinquency</i> Cases	
Performance Standards	
Chapter 3	29
Specific Standards For Representation In <i>Juvenile Dependency</i> Cases	
Performance Standards	
Chapter 4	45
Specific Standards For Representation In <i>Civil Commitment</i> <i>Proceedings</i>	
Chapter 5	51
Maximum Caseload Standards For Defense Counsel	
Appendix	55
Survey Results	
Annotations	81

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Preface

Like every other modern society, we are a society of laws. And, like every other society, we have law breakers. We demand that law breakers be accountable for their actions but, unlike some modern societies, we also demand that any such accountability be assessed fairly. To that end, we have set up an elaborate justice system to assure both accountability and fairness.

Assessment of accountability within the justice system is assigned to an institution — the courts — that is intended to provide fairness to the individual. But fairness has never been self-executing. In that part of the justice system that we address, society stands arrayed against the individual — the might of all against the lone accused. If the desire for fairness, for justice, is to be matched in reality, the individual accused must have a voice. That voice is the defense counsel.

The task of the defense counsel is never easy. Identified by society with the client, counsel often must endure community condemnation and contempt. Frequently looked down on by others in the profession, counsel nonetheless must adhere to that profession's ethical standards, as well as to an additional set of standards set by state and federal constitutions. Less well rewarded than many who practice other specialties, counsel must be sustained in part by less tangible considerations, such as a dedication to justice for its own sake.

The Task Force has included the foregoing Preface to its work in order to make a small acknowledgment to the dedication, idealism, and high professionalism of the men and women of the defense bar who have helped it with its studies, and to their many colleagues. It would be easy for defense counsel to do as little as possible — hours are long, clients often difficult, pay low, prestige minimal. But defense counsel constantly strive to improve themselves and their part in the justice system. The following Principles and Standards are a reflection of that effort, as the Committee has come to understand it. The Principles and Standards thus are not, in Oregon, an indictment of a branch of the legal profession, coupled with a demand for change. They are, instead, a realization of the high standards that Oregon defense counsel are prepared to set for themselves.

Hon. W. Michael Gillette
Associate Justice
Oregon Supreme Court

Forward

The Principles and Performance Standards herein are meant to apply when a lawyer is appointed or retained to represent an individual client in a criminal, juvenile delinquency, juvenile dependency or civil commitment proceeding. The common denominator in these four types of cases is that the clients are subjected to state action that can deprive them of substantial liberty interests. These standards are not intended to address the representation of clients in appellate, probation violation, post conviction relief and habeas corpus cases. However, the Task Force recommends that appropriate standards for these types of cases be studied and adopted in the future.

The Principles and Standards build upon a number of national and state standards which are intended to establish a framework for improvement of lawyer practice in general and in the specific types of cases they address. They assert the importance of quality representation by competent and diligent lawyers.

The Principles and Standards contain five chapters. Chapter 1 provides *general* standards for counsel who provide representation to individuals in criminal, delinquency, dependency and civil commitment proceedings. Chapters 2 through 4 contain *specific* standards for each of these types of cases. Chapter 5 sets forth *maximum* caseload standards for each type of case under optimum circumstances. The Annotations to the Principles and Standards cite standards, caselaw and other reference sources. The Appendix contains summaries and detailed data from surveys the Indigent Defense Task Force conducted and received.

Many of the standards are phrased in terms of counsel "should" do "x". Use of the word "should" rather than "shall" recognizes that the standards are intended to be followed in most instances, but that exceptions may be justified in particular instances. The practice of law varies on a case-by-case basis and the standards may not apply equally to each and every case. A deviation from the standards is not necessarily equivalent to a violation of a lawyer's ethical duties, nor does a deviation from the standards necessarily result in the provision of ineffective assistance of counsel or professional malpractice.

The Standards in Chapters 1 and 2 were adapted primarily from the National Legal Aid and Defender Association *Performance Guidelines for Criminal Defense Representation* (1994), (referred to hereinafter as *NLADA Guidelines*) with the permission of the National Legal Aid and Defender Association (NLADA). Their purpose and intent is perhaps best expressed by the NLADA in its Introduction to the *NLADA Guidelines*:

Defending criminal cases is an increasingly complex and difficult job.

The unending variety of factual situations presented by criminal cases and the constant changes in criminal law and procedure require that the attorney approach each new case with a fresh outlook. These complexities also make the drafting of general performance guidelines a difficult and challenging task. But there are procedures common to all criminal cases with which the attorney must be familiar in order to be able to incorporate and best utilize the varying facts and law of each individual case. The object of these *Guidelines* is to alert the attorney to possible courses of ac-

tion that may be necessary, advisable, or appropriate, and thereby to assist the attorney in deciding upon the particular actions that must be taken in a case to ensure that the client receives the best representation possible. While these *Guidelines* will perhaps be most useful to the new attorney or the attorney who does not have significant experience in criminal cases, they also may be profitably examined by the experienced defense attorney in deciding upon the strategy and approach to a given case. (Footnote omitted.)

The above-stated purpose and intent also underlie the standards set forth in Chapters 3 and 4 regarding representation in juvenile dependency and civil commitment proceedings.

The *NLADA Guidelines*, while cautioning counsel not to become complicit in a system that routinizes questionable practice, state the following with respect to the manner in which the guidelines should be interpreted:

These *Guidelines* do not say that defense counsel can *never* engage in plea negotiations without the client's prior consent ..., just as they do not say counsel must *always* interview a client prior to bail/bond proceedings concerning the client's release ..., or even before preliminary hearing But counsel's paramount obligation ... does require that counsel not merely accept, on behalf of a client, systemic forces that are harmful to the client's interests. (Footnote 12, page 75, *NLADA Guidelines*.)

Finally, simply applying the "Principles and Standards" to counsel will not by itself ensure quality representation, fairness and justice.

First, it is important to recognize that judicial administrators, trial judges, prosecutors and other system components play pivotal roles in the successful implementation of these "Principles and Standards". All justice system "players" need to consider and incorporate the standards into their own practices and policies to enable counsel to meet these standards and to assure the system operates as an integrated whole in the delivery of justice.

Second, in those cases involving indigent persons, sufficient funding must be provided by the state. Without adequate funds, the goals of these "Principles and Standards" will not be reached and the justice system as a whole will suffer.

Principles

General Principles for Counsel In Criminal, Delinquency, Dependency And Civil Commitment Cases

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence (sic).

Article I, Section 11 of the Oregon Constitution

In all criminal prosecutions, the accused shall have the right ... to be heard by himself and counsel.

Fourteenth Amendment to the United States Constitution

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Principles

PRINCIPLE 1

The paramount obligation of counsel is to provide quality representation and diligent advocacy for the client at all stages of the representation.

PRINCIPLE 2

To provide quality representation and diligent advocacy, counsel must preserve, protect and promote the client's rights and interests.

PRINCIPLE 3

To ensure the preservation, protection and promotion of the client's rights and interests, counsel must:

1. be proficient in the applicable substantive and procedural law;
2. abide by the Code of Professional Responsibility and the rules of the court;
3. acquire and maintain appropriate experience, skills and training;

4. devote adequate time and resources to the case;
5. engage in the preparation necessary for quality representation;
6. endeavor to establish and maintain a relationship of trust and open communication with the client;
7. keep the client informed and seek the lawful objectives of the client; and
8. make accommodations where necessary due to a client's special circumstances, such as youth, mental or physical disability, or foreign language barrier.

PRINCIPLE 4

To promote the interests of clients and society at large, counsel must actively seek improvement in the administration of justice, including the provision of adequate resources.

Performance Standards

Chapter 1

General Standards For Representation In *All* Criminal, Delinquency, Dependency And Civil Commitment Cases

STANDARD 1.1 — Prerequisites For Representation

Counsel shall only accept an appointment or retainer if counsel is able to provide quality representation and diligent advocacy for the client.

Implementation

1. Counsel should be proficient in applicable substantive and procedural law and stay current with changes in constitutional, statutory, evidentiary law and local or statewide court rules.
2. Counsel should have appropriate experience, skills and training.
 - a. Counsel should obtain formal and informal training in the relevant areas of practice and should consult with others in the field, including non-attorneys.
 - b. Less experienced counsel should observe and when possible serve as co-counsel to more experienced attorneys. More experienced counsel should mentor less experienced attorneys.
3. Counsel should have adequate time and resources.
 - a. Counsel should not accept caseloads that by reason of excessive size and/or complexity interfere with the provision of quality representation.
 - b. Counsel should have access to sufficient support services and physical resources to allow for quality representation.
4. Counsel appointed by a court to represent a client at government expense shall meet and certify compliance with the "Qualification Standards for Court-Appointed Counsel to Represent Indigent Persons at State Expense", promulgated by the State Court Administrator.

STANDARD 1.2 — General Duties And Responsibilities Of Counsel To Clients; Avoiding Conflict Of Interests

Upon being retained or appointed by the court, counsel should contact the client as soon as practicable AND maintain regular contact thereafter. Counsel should endeavor to establish a relationship of trust and open communication with the client and should diligently advocate the client's position within the bounds of the law and the Rules of Professional Responsibility.

Implementation

1. As soon as practicable after being retained or appointed, counsel should contact the client and conduct an initial client interview.
2. Counsel should ensure that barriers to communication with the client, such as differences in language or literacy, are overcome. Counsel should make accommodations where necessary due to a client's special circumstances, such as youth, mental or physical disability, or foreign language barrier, including assuring that counsel has sufficient additional time and resources to make those accommodations.

3. Counsel should maintain regular contact with the client and should keep the client informed of the progress of the case, including:
 - a. the importance of maintaining contact with counsel and the need to notify counsel of any change of address;
 - b. the names and contact information regarding counsel and staff assisting with the case; and
 - c. any court dates and significant developments in the case.
4. Counsel should not delegate tasks to others if to do so would compromise the effectiveness of the representation. Counsel should not delegate non-ministerial and non-routine court appearances to other counsel without the consent of the client.
5. Counsel should be alert to all potential and actual conflicts of interest. If counsel identifies an actual conflict of interest, counsel should immediately request permission from the court to withdraw and substitution of qualified counsel. If counsel identifies a potential or likely conflict of interest, counsel should fully disclose the conflict to all affected clients and, if appropriate, obtain informed consent to proceed on behalf of those clients.
6. Counsel should preserve client confidences and secrets and should not knowingly disclose confidential information obtained during the course of representation, unless authorized to do so by the client or the court or as otherwise permitted by law or the Rules of Professional Responsibility.

STANDARD 1.3 – Role Of Counsel

Counsel should seek the lawful objectives of the client and should not substitute counsel's judgment for that of the client in those case decisions that are the responsibility of the client.

Implementation

1. Counsel is ordinarily bound by the client's definition of his or her interests and should not substitute counsel's judgment for that of the client regarding the objectives of the representation.
2. Counsel should advise the client regarding the probable success and consequences of adopting any posture in the proceedings and give the client the information necessary to make an informed decision. Counsel should consult with the client regarding the assertion or waiver of any right or position of the client.
3. Counsel should consult with the client as to the strategy and means by which the client's objectives are to be pursued and exercise his or her professional judgment concerning technical and legal tactical issues involved in the representation.

STANDARD 1.4 – Initial Client Interview

Counsel should conduct a client interview as soon as practicable after being retained or appointed by the court, in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning counsel's representation and the case proceedings.

Implementation

1. To the extent possible, counsel should prepare for an initial interview with the client by reviewing petitions and/or charging documents, police and other investigative agency reports, and the reports of pretrial detention agencies, where applicable.
2. Counsel should conduct the initial interview with the client as soon as practicable and sufficiently before any court proceeding so as to be prepared for that proceeding. In instances where the client is detained or in custody, counsel should make every effort to conduct an initial

- interview within 48 hours of acceptance of a retainer or court appointment.
3. At the initial interview, counsel should obtain the following types of information from the client:
 - a. the facts surrounding the allegations against or affecting the client;
 - b. any possible witnesses who should be located;
 - c. any evidence of improper conduct by police or other investigative agencies, juvenile or mental health departments or the prosecution which may affect the client's rights;
 - d. any evidence that should be preserved; and
 - e. evidence of the client's competence to stand trial and/or mental state at the time of the offense.
 4. Counsel should convey the following types of information to the client:
 - a. the nature of the allegations, what the state must prove, and the likely and maximum potential consequences;
 - b. the role of counsel and the defense function;
 - c. an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;
 - d. a general procedural overview of the likely progression of the case;
 - e. the procedures that will be followed in setting the conditions of pretrial release, if applicable to the type of proceeding and the particular client;
 - f. an explanation of the type of information that will likely be requested in any interview that may be conducted by pretrial release, juvenile court counselors, children's services personnel, or civil commitment investigators or doctors and what information the client should and should not provide;
 - g. how and when counsel can be reached;
 - h. when counsel will see the client next;
 - i. realistic answers, where possible, to the client's most urgent questions; and
 - j. what arrangements will be made or attempted for the satisfaction of the client's most pressing needs; e.g., medical or mental health attention, contact with family or employers.

STANDARD 1.5 — Theory Of The Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case.

Implementation

1. Counsel should develop an overall theory of the case that encompasses the best interests of the client and the realities of the client's situation in order to assist counsel in evaluating choices throughout the course of the representation.
2. Counsel should allow the case theory to focus the investigation and trial preparation of the case, seeking out and developing the facts and evidence that the theory makes material, but counsel should not become a "prisoner" of his or her theory.

Performance Standards

Chapter 2

Specific Standards For Representation In Criminal And Juvenile Delinquency Cases

This chapter pertains to representation in both adult *criminal* and *juvenile delinquency* cases. The two types of proceedings are grouped together in one chapter because they have many similarities. Any differences in representation are indicated where appropriate. This grouping recognizes that counsel must employ the same general standards of practice in providing representation to youth in juvenile delinquency proceedings and to adult defendants in criminal cases, with special accommodation for the needs of juvenile clients. Efforts have been made to use generic terms that apply to both types of proceedings to the extent possible. For example, the term "disposition" refers to sentences in adult criminal cases and to juvenile dispositions, and the term "admission" includes guilty and nolo contendere pleas in criminal proceedings and admissions to allegation(s) in juvenile delinquency petitions. "Admission agreements" include plea agreements and agreements to admit jurisdiction in delinquency cases.

STANDARD 2.1 — Prerequisites For Representation

Counsel should be proficient in applicable substantive and procedural law and should have appropriate experience, skill and training for the type of representation required.

Implementation

1. In addition to meeting the requirements for experience and training in Standard 1.1, *supra*, counsel should have at least fifteen (15) hours of mandatory continuing legal education training each year, at least ten (10) of which should relate

to the practice of criminal defense or juvenile law.

2. Counsel for juveniles should develop a basic knowledge of child development and adequate communication skills to communicate effectively with child clients.
3. Counsel should visit at least two correctional, juvenile or treatment facilities.

STANDARD 2.2 — General Duties And Responsibilities Of Counsel; Avoiding Conflicts Of Interest

In adult criminal and juvenile delinquency matters, counsel or counsel associated in practice should avoid representing two or more clients who have been jointly charged or whose cases have been consolidated.

Implementation

1. Counsel should follow Standard 1.2 Implementation 5 with regard to potential and actual conflicts of interest. In both adult criminal and juvenile delinquency matters, counsel and counsel associated in practice should avoid representing two or more clients who have been jointly charged or whose cases have been consolidated for trial or hearing.

STANDARD 2.3 — Role Of Counsel

Counsel should seek the lawful objectives of the client and should not substitute counsel's judgment for that of the client in those case decisions that are the responsibility of the client.

Implementation

1. Counsel should follow Standard 1.3, Implementations 1 and 2.
2. Decisions as to whether to enter an admission, accept diversion or other pretrial early disposition, testify, or waive any right with respect to jurisdiction, trial, or waiver, are ultimately for the client to determine.
3. In juvenile delinquency and status offense proceedings as in adult criminal matters, counsel is ordinarily bound by the client's definition of his or her interests and should not substitute counsel's judgment for that of the client regarding the objectives of the representation. See Standard 3.3, *infra*.

STANDARD 2.4 — Obligations Of Counsel Regarding Pretrial Release

When a client is in custody, counsel should explore with the client the pretrial release of the client under the conditions most favorable to the client and attempt to secure that release.

Implementation

1. Counsel should obtain information regarding the client's ties to family, the community, immigration status, school or employment records, physical and mental health, participation in community programs, past criminal and delinquency record, the ability of the client, relatives or third parties to meet any financial conditions of release and the names of individuals or other sources that counsel can contact to verify the information provided by the client.
2. Counsel should present to the appropriate judicial officer information about the client's circumstances and the legal criteria supporting release. Where appropriate, counsel should make a proposal concerning conditions of release that are least restrictive with regard to the client. Counsel should arrange for contact with or the appearance of parents, spouse, relatives of other per-

sons who may take custody of the client or provide third party surety.

3. Counsel for juveniles should seek to have a minister, teacher, relative or other mentor come to the detention hearing to offer to provide extra guidance and positive activities for the youth during release. Counsel for juveniles should be aware of the alternatives to secure detention, including group homes, residential treatment, drug and alcohol treatment facilities, house arrest or other non-secure community based alternatives.
4. If a juvenile client is released, counsel should assure that the client's needs for safety and right to receive treatment are met by agencies responsible for the client's care.
5. Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under available procedures.
6. If the court sets conditions of release, counsel should explain to the client and any third party the conditions of release and potential consequences of violating such conditions. If the court sets as a condition of release that security be posted, counsel should explain to the client and any third party the available options, procedures, and risks in posting security.
7. Where the client is unable to obtain pretrial release, counsel should inform the court and the jail or juvenile detention facility personnel about any medical, psychiatric, or security needs of the client. Juvenile clients in detention or shelter care should be advised of the right to have the placement decision reviewed every ten days, and counsel should seek review if requested by the client.

STANDARD 2.5 — Initial Court Appearances

Counsel should preserve all of the client's constitutional and statutory rights at initial court appearances.

Implementation

Counsel should:

1. Promptly advise the client of and take action to preserve all constitutional and statutory rights of the client, including the right to remain silent, to file motions challenging the charging instrument, and to enter a plea of not guilty or deny the allegations contained in a delinquency petition and to request a jury trial, where failure to do so may result in the client being precluded from later obtaining such rights.
 2. Request a timely preliminary hearing, if it is provided for under the rules of the court, unless there is a sound tactical reason not to do so.
 3. If a preliminary hearing is held, review the allegations, marshal the evidence, and prepare to challenge the state's evidence and arguments.
 4. Review probable cause documents and any probable cause arguments, and, if no probable cause is established or other grounds for dismissal exist, ask the court to dismiss the charges.
 5. Ensure that bail has been set, seek reductions in bail if appropriate, and initiate alternative release options.
 - b. any defects in the charging instrument, such as statute of limitations or double jeopardy; and
 - c. the available defenses, ordinary and affirmative, and whether notice of any defense is required and any specific timelines for giving such notice.
3. Conduct an in-depth interview with the client covering:
 - a. the events giving rise to the allegation(s);
 - b. the existence of witnesses or other potential sources of information;
 - c. any evidence of improper conduct by police or other investigative agencies, juvenile or mental health departments or the prosecution which may affect the client's rights; and
 - d. information relevant to pretrial/prehearing release and possible disposition.
 4. Attempt to have all potential witnesses (adverse, neutral and favorable) located, interviewed, and, if appropriate, subpoenaed by an investigator or other appropriately trained person. If counsel conducts a witness interview, counsel should do so in the presence of a third person who is available to appear as a witness at trial or hearing.
 5. Request and secure discovery including:
 - a. potential exculpatory information;
 - b. names and addresses of all prosecution witnesses, their prior statements, and criminal records;
 - c. oral and written statements by the client and details of the circumstances under which the statements were made;
 - d. the client's prior delinquency and/or criminal record and evidence of other misconduct that the prosecutor may intend to use against the client;
 - e. books, papers, documents, photographs, audio and videotapes, computer discs, tan-

STANDARD 2.6 — Independent Investigation

Counsel should promptly conduct an independent review and investigation of the case, including obtaining information, research and discovery necessary to prepare the case for trial or hearing.

Implementation

Counsel should:

1. Obtain and examine all charging documents, pleadings and discovery.
 2. Research and review the relevant statutes and caselaw to identify:
 - a. the elements of the charged offense(s);
- b. any defects in the charging instrument, such as statute of limitations or double jeopardy; and
 - c. the available defenses, ordinary and affirmative, and whether notice of any defense is required and any specific timelines for giving such notice.
3. Conduct an in-depth interview with the client covering:
 - a. the events giving rise to the allegation(s);
 - b. the existence of witnesses or other potential sources of information;
 - c. any evidence of improper conduct by police or other investigative agencies, juvenile or mental health departments or the prosecution which may affect the client's rights; and
 - d. information relevant to pretrial/prehearing release and possible disposition.
 4. Attempt to have all potential witnesses (adverse, neutral and favorable) located, interviewed, and, if appropriate, subpoenaed by an investigator or other appropriately trained person. If counsel conducts a witness interview, counsel should do so in the presence of a third person who is available to appear as a witness at trial or hearing.
 5. Request and secure discovery including:
 - a. potential exculpatory information;
 - b. names and addresses of all prosecution witnesses, their prior statements, and criminal records;
 - c. oral and written statements by the client and details of the circumstances under which the statements were made;
 - d. the client's prior delinquency and/or criminal record and evidence of other misconduct that the prosecutor may intend to use against the client;
 - e. books, papers, documents, photographs, audio and videotapes, computer discs, tan-

gible objects, buildings or other materials relevant to the case;

- f. statements and reports of experts, including data and documents upon which they are based;
 - g. reports of and underlying data for relevant physical or mental examinations, scientific tests, experiments and comparisons;
 - h. statements of co-defendants;
 - i. inspection of physical evidence; and
 - j. reports or notes of searches or seizures and the circumstances of any searches or seizures.
6. When appropriate, request the opportunity to inspect the District Attorney's file, if the procedure in the local jurisdiction so provides.
7. Request and secure other information relevant to the case, including:
- a. law enforcement notes (field notes);
 - b. client, victim or witness records, such as school, mental health, drug and alcohol and criminal records, with appropriate releases;
 - c. 911 tapes, interofficer radio transmissions and dispatch reports; and
 - d. internal affairs files and investigation records.
8. Inspect the scene of the alleged offense under circumstances similar to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).
9. Be familiar with and where appropriate obtain the assistance of experts and other professionals to provide consultation and testimony regarding issues in the case, evaluations of clients and others, and testing of physical evidence.

STANDARD 2.7 — Pretrial Motions; Hearings Regarding Ability To Aid And Assist And Waiver Of Juvenile Court Jurisdiction

Counsel should research, prepare, file and argue appropriate pretrial motions whenever there is reason to believe the client is entitled to relief. Counsel should be prepared to provide quality representation and advocacy for the client at any hearings regarding the client's ability to aid and assist and waiver of juvenile court jurisdiction.

Implementation

- 1. Counsel should research, prepare, file and argue pretrial motions and notices if appropriate to address issues such as:
 - a. Constitutionality of relevant statute(s);
 - b. Defects in the charging process or instrument;
 - c. Severance of charges and/or co-defendants for trial;
 - d. *Brady v. Maryland* motions;
 - e. Motions to compel discovery;
 - f. Motions for sanctions because of discovery violations;
 - g. Violations of federal and state constitutional and statutory provisions, including but not limited to:
 - i. illegal searches and/or seizures;
 - ii. statements obtained in violation of the client's right to counsel or privilege against self-incrimination;
 - iii. unreliable identification evidence;
 - iv. speedy trial; and
 - v. double jeopardy.
 - h. Motions or requests for extraordinary expenses, such as:
 - i. interpreters;

- ii. experts for psychological evaluation for the purpose of aid and assist, diminished capacity, guilty but insane, waiver or disposition; and
 - iii. forensic services.
 - i. Matters of trial evidence which may be appropriately litigated by means of a motion in limine.
 - j. Notices of affirmative defenses.
 - k. Motions to dismiss based on civil compromise, "best interests of the youth", "in the furtherance of justice" and "general equitable powers of the court".
2. Counsel should take the following steps with regard to seeking a determination of the client's ability to aid and assist:
- a. Whenever counsel has a good faith doubt as to the client's ability to aid and assist in the proceedings, counsel should fully advise the client concerning the consequences of a determination that the client is unable to aid and assist and should move for an evaluation of the client, if the client so agrees. If the client opposes such an evaluation, counsel should inform the court that counsel has a good faith doubt of the client's ability to aid and assist in the matter, but should not divulge the client's confidences and secrets.
 - b. If the client agrees, counsel should obtain an independent evaluation of the client or should advocate that evaluators appointed by the court are qualified by training and experience to testify concerning the client's ability to aid and assist. If the client and prosecutor concur, counsel may stipulate that the client is unable to aid and assist counsel in the proceedings.
 - c. At the hearing to determine whether the client is able to aid and assist, counsel should protect and exercise the client's constitutional and statutory rights, including cross-examining the state's witnesses, calling witnesses on behalf of the client such as independent experts, and making appropriate evidentiary objections.
- d. Counsel may elect to relate to the court personal observations of and conversations with the client to the extent that counsel does not disclose client confidences and secrets. Counsel may respond to inquiries about the attorney-client relationship and the client's ability to communicate effectively with counsel to the extent that such responses do not disclose the client's confidences and secrets.
- e. If an adult client is found to be unable to aid and assist, counsel should advocate for the least restrictive level of supervision and the least intrusive treatment. If a juvenile client is found to be unable to aid and assist in a juvenile court proceeding, counsel should seek to resolve the delinquency matter by having the petition converted to a dependency petition. An appropriate disposition should be sought as in a dependency case. (See Standard 3.10, *infra*.)
- f. If the client is found able to aid and assist, counsel should recognize a continuing obligation during the course of the proceedings to raise good faith concerns about the client's ability to aid and assist.
3. Counsel should do the following with regard to opposing waiver of juvenile court jurisdiction in juvenile proceedings:
- a. Counsel should investigate and become knowledgeable about the consequences of waiver of juvenile court jurisdiction in the particular client's case and should thoroughly explain the consequences to the client.
 - b. If the client decides to oppose waiver of the juvenile court's jurisdiction, counsel should be fully prepared to present evidence and argument against the waiver, including that the client is still a child, would benefit from

services in the juvenile system, has not had sufficient opportunity to be rehabilitated, would likely be harmed in the adult system and that the community could be adequately protected from the youth during treatment as a juvenile.

- c. At the waiver hearing, counsel should address all the requirements of ORS 419C349. To make an "amenability" argument, counsel should at a minimum:
 - i. describe the youth's background, including attachment to family and positive statements from individuals who believe the youth has potential;
 - ii. show that the youth was not thinking as an adult at the time of the offense;
 - iii. describe the youth's moral development and remorse;
 - iv. document successful juvenile interventions that have been used for similar youth; and
 - v. describe how the youth's delinquent behavior could change if services met his or her needs.
- d. If juvenile court jurisdiction is waived, counsel should make effort to have the client released pending trial or held in a juvenile facility. If the client is transferred to an adult facility, counsel should advocate for measures that will protect the client and provide age appropriate services including mental health and educational or special education services.

STANDARD 2.8 – Pretrial Negotiations And Admission Agreements

Counsel should:

- 1. with the consent of the client explore diversion and other informal and formal admission or disposition agreements with regard to the allegations;

- 2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
- 3. keep the client fully informed of the progress of the negotiations;
- 4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;
- 5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and
- 6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.

Implementation

- 1. Counsel should be fully aware, and ensure the client is fully aware, of:
 - a. rights the client will waive by entering into a pretrial admission or disposition agreement;
 - b. conditions and limits of the agreement;
 - c. nature of the admission hearing and the role the client will play in the hearing, including answering questions of the judge and in many instances, providing a statement concerning the offense;
 - d. deferred sentences, conditional discharges and diversion agreements;
 - e. the likely disposition, including what is required by the sentencing guidelines and the effect of the admission agreement on the client's criminal history;
 - f. possible and likely sentence enhancements, and probation or post-incarceration supervision consequences;
 - g. available drug rehabilitation programs, psychiatric treatment, and health care;

- h. incarceration including any mandatory minimum requirements and maximum terms;
 - i. the possible and likely place and manner of confinement;
 - j. credit for pretrial detention;
 - k. the effect of good-time credits on the client's release date and how those credits are earned and calculated;
 - l. self-surrender to place of custody;
 - m. eligibility for correctional programs, work release and conditional leaves;
 - n. probation or suspension of sentence and permissible conditions of probation;
 - o. restitution, fines, assessments and court costs;
 - p. if applicable, parole or post-prison supervision eligibility, applicable ranges, and likely post-prison supervision conditions;
 - q. asset forfeiture;
 - r. collateral consequences of conviction, e.g. deportation, civil disabilities, and enhanced sentences for future convictions;
 - s. restrictions on, loss of, or other potential consequences affecting the client's driver's or professional license; and
 - t. possibility of later expungement and sealing of records.
2. In conducting negotiations, counsel should be familiar with the various types of admissions or pretrial dispositions that may be agreed to, including a plea of guilty, a plea of nolo contendere, a conditional plea of guilty, a plea in which the defendant is not required to personally acknowledge his or her guilt (Alford plea), and an admission to juvenile court jurisdiction.
3. The decision to enter an admission rests solely with the client and the client's decision must be knowing, voluntary and intelligent.
4. When the client enters an admission, counsel should make sure the full content and conditions of the admission agreement are placed on the record before the court.
5. If the client is in custody or may be taken into custody after entry of the admission, counsel should seek release pending formal disposition.

STANDARD 2.9 – Trial

Counsel should be prepared to provide quality representation and advocacy for the client at any court or jury trial.

Implementation

1. Preparation for Trial
- a. In an adult criminal case, counsel should discuss with the client the relevant strategic considerations of waiving a jury trial in favor of a bench trial or plea;
 - b. Counsel should have the following materials available at the time of trial:
 - i. copies of all relevant documents filed in the case;
 - ii. relevant documents prepared by investigators;
 - iii. voir dire questions;
 - iv. outline or draft of opening statement;
 - v. cross-examination plans for all possible prosecution witnesses;
 - vi. direct examination plans for all prospective witnesses for the client;
 - vii. copies of subpoenas;
 - viii. prior statements of all the prosecution's witnesses (e.g., transcripts, police reports);
 - ix. prior statements of all the client's witnesses;
 - x. reports from experts;

- xi. a list of exhibits, and the witnesses through whom they will be introduced;
 - xii. originals and copies of all documentary exhibits;
 - xiii. proposed jury instructions with supporting authority;
 - xiv. copies of all relevant statutes and cases;
 - xv. evidence codes and relevant statutes and/or compilations of evidence rules and criminal or juvenile law most likely to be relevant to the case;
 - xvi. outline or draft of closing arguments.
- c. Counsel should decide whether to file a motion in limine to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the client) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.
 - d. Throughout the trial process, counsel should ensure all legal issues are preserved and an adequate record is made for appellate review. Counsel should assure that all proceedings are on the record.
 - e. Counsel should be prepared to make all appropriate evidentiary objections and offers of proof, and should vigorously contest the state's evidence through objections and cross-examination of state's witnesses.
 - f. Counsel should advise the client and the client's witnesses as to suitable courtroom dress, decorum, and demeanor, and should counsel the client and witnesses concerning timeliness and sobriety issues. If the client or the client's witness is incarcerated, counsel should ensure that the client or witness does not appear before the jury in jail clothing.
 - g. Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences.
- h. Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon disposition if there is a finding of guilt or in a juvenile proceeding that the youth is within the jurisdiction of the court.
2. Jury Selection in Adult Criminal Cases
- a. Counsel should be familiar with the procedures by which a jury venire is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.
 - b. Counsel should develop voir dire questions in advance of trial.
 - c. Counsel should tailor voir dire questions to the specific case. Among the purposes voir dire questions should be designed to serve are the following:
 - i. to elicit information about the attitudes of individual jurors, which will inform counsel about peremptory challenges and challenges for cause;
 - ii. to convey to the panel certain legal principles which are critical to the case;
 - iii. to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
 - iv. to present the client and the client's case in a favorable light, without prematurely disclosing information about the case to the prosecutor; and
 - v. to establish a relationship with the jury.
 - d. Counsel should be familiar with the law concerning mandatory and discretionary voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.

- e. Counsel should be familiar with the law concerning challenges for cause and peremptory challenges.
 - f. If the voir dire questions may elicit sensitive answers, counsel should request that questioning be conducted outside the presence of the remaining jurors.
 - g. In a group voir dire, counsel should avoid asking questions which may elicit responses which are likely to prejudice other prospective jurors.
 - h. Counsel should challenge for cause all persons about whom a legitimate argument can be made for actual prejudice or bias if it is likely to benefit the client.
3. Opening Statements
- a. Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.
 - b. Counsel's objective in making an opening statement may include the following:
 - i. provide an overview of the defense case;
 - ii. identify the weaknesses of the prosecution's case;
 - iii. emphasize the prosecution's burden of proof;
 - iv. summarize the testimony of witnesses and their roles in relationship to the entire case;
 - v. describe the exhibits which will be introduced and the role of each in relationship to the entire case;
 - vi. clarify the juror's responsibilities; and
 - vii. state the ultimate inferences which counsel wishes the jury to draw.
 - c. Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.
4. Proof
- a. Counsel should anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.
 - b. Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.
 - c. In preparing for cross-examination, counsel should:
 - i. be prepared to question witnesses as to the existence of prior statements which they may have made or adopted;
 - ii. consider the need to integrate cross-examination, the theory of the defense and closing argument;
 - iii. consider whether cross-examination of each individual witness is likely to generate helpful information;
 - iv. anticipate those witnesses the prosecution might call in its case-in-chief and in rebuttal;
 - v. consider a cross-examination plan for each of the anticipated witnesses;
 - vi. be alert to inconsistencies or variations in a witness testimony;
 - vii. review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
 - viii. review relevant statutes and local police regulations for possible use in cross-examining police witnesses;

- ix. be alert to issues relating to witness credibility, including but not limited to background, bias and motive for testifying.
 - d. Counsel should be aware of the applicable law concerning competency of witnesses and admission of expert testimony in order to raise appropriate objections.
 - e. Before beginning cross-examination, counsel should ascertain whether the prosecution has provided copies of all prior statements. If counsel does not receive prior statements of prosecution witnesses until the prosecution has completed direct examination, counsel should, at a minimum, request adequate time to review these documents before commencing cross-examination.
 - f. At the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of acquittal on each count charged. Counsel should request, when necessary, that the court immediately rule on the motion in order that counsel may make an informed decision whether to present a defense.
 - g. Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden.
 - h. Counsel should discuss with the client all of the considerations relevant to the client's decision to testify.
 - i. Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.
 - j. In preparing for presentation of a defense case, counsel should:
 - i. develop a plan for direct examination of each potential defense witness;
 - ii. determine the order of witnesses;
 - iii. consider the possible use of character witnesses; and
 - iv. consider the need for expert witnesses.
 - k. In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecution.
 - l. Counsel should prepare all witnesses for direct and possible cross-examination. Counsel should also advise witnesses of suitable courtroom dress and demeanor.
 - m. Counsel should conduct redirect examination as appropriate.
 - n. At the close of the defense case, counsel should renew the motion for judgment of acquittal (or directed verdict) on each charged count.
5. Closing Argument
- a. In developing closing argument, counsel should review the proceedings to determine:
 - i. what aspects can best be used in support of the defense, for example:
 - (a) weaknesses in the prosecution's case; and
 - (b) favorable inferences to be drawn from the evidence.
 - ii. what to incorporate into the argument, for example:
 - (a) helpful testimony from direct and cross-examinations;
 - (b) verbatim instructions drawn from the jury charge; and

- (c) responses to anticipated prosecution arguments;
- iii. what the possible effects of the defense arguments are on the prosecution's rebuttal argument.
- b. Whenever the prosecution exceeds the scope of permissible argument, counsel should object, request a mistrial, or seek cautionary instructions unless tactical considerations suggest otherwise.
- c. Where appropriate, counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense.
- d. Counsel should object to and argue against improper instructions proposed by the prosecution.
- e. If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record.
- f. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.
- g. If the court proposes giving supplemental instructions to the jury, counsel should request that the judge state the proposed instructions to counsel before they are delivered to the jury and, if appropriate, take all steps necessary to preserve the record.

STANDARD 2.10 — Sentencing Or Disposition

Counsel should:

1. **be knowledgeable in disposition provisions and alternatives;**

2. **ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the disposition to be imposed;**
3. **ensure all reasonably available mitigating and favorable information is presented to the court.**
4. **in delinquency cases and in adult criminal cases as appropriate, be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate or unfavorable information presented by other parties.**
5. **in delinquency cases, advocate for or develop dispositional resources that will aid the client in obtaining the least restrictive disposition, and obtain all appropriate orders to protect the youth's rights and interests.**

Implementation

1. Counsel should be fully aware, and make sure the client is fully aware of:
 - a. sentencing guideline structure, if applicable, or the maximum, mandatory, minimum and likely sentence or disposition, including likely jail, detention or prison time, or training school commitment;
 - b. the statutory and philosophical differences in juvenile court disposition and adult sentencing. The global focus of juvenile court dispositions include planning to meet the youth's educational, emotional and physical needs while protecting the public from future offenses;
 - c. imprisonment or incarceration, including any mandatory minimum requirements and maximum terms;
 - d. restitution, fines, unitary assessments and court costs;
 - e. possible and likely sentence enhancements, and probation, parole, or post-prison supervision consequences;

- f. asset forfeiture;
 - g. deferred sentences, conditional discharges, informal disposition, or conditional postponement and diversion agreements;
 - h. probation or suspension of sentence and permissible conditions of probation;
 - i. possibility of later expungement and sealing of records;
 - j. the possible and likely place and manner of confinement;
 - k. credit for pretrial detention;
 - l. the effect of good-time credits on the client's release date and how those credits are earned and calculated;
 - m. if applicable, parole or post-prison supervision eligibility and applicable release ranges;
 - n. self-surrender to place of custody;
 - o. likely post-prison or training school supervision conditions;
 - p. eligibility for correctional programs, work release and conditional leaves;
 - q. available drug rehabilitation programs, psychiatric treatment, and health care;
 - r. collateral consequences of conviction, e.g. deportation, civil disabilities, sex offender registration, DNA and AIDS testing, and enhanced sentences for future convictions;
 - s. restrictions on, loss of, or other potential consequences affecting the client's driver's or professional license;
 - t. the purpose of the interview for the Pre-Sentence Investigation (PSI) or the interview of the juvenile court counselor for disposition, including that the client's attitude may be a critical factor in obtaining a favorable recommendation for sentencing or disposition and that clients who appear cooperative, concerned, remorseful, and responsible will fare better;
 - u. the juvenile court's very broad discretion in ordering dispositions that may range from fines, restitutions, community service or unsupervised probation (bench probation), in which the youth is placed at home, to closely supervised probation at home, placement in a group home in the community, placement in a highly structured residential treatment program, placement in a staff secure or locked program, commitment to a locked psychiatric hospital, or commitment to a locked juvenile institution (training school).
2. Counsel should be familiar with the sentencing and dispositional hearing procedures, including:
- a. effect that plea negotiations may have upon the sentencing discretion of the court;
 - b. procedural operation of any sentencing guideline system;
 - c. effect of a judicial recommendation against deportation;
 - d. access to the presentence or dispositional report by counsel, the client, and others;
 - e. availability of assessments such as psychiatric, psychological, educational or neurological evaluations to both the PSI investigator or juvenile court counselor and client's counsel in preparing sentencing or dispositional recommendations;
 - f. prosecution's practice in preparing sentencing or dispositional recommendations;
 - g. use of a sentencing or dispositional memorandum by counsel;
 - h. opportunity to challenge information presented to the court for sentencing or dispositional purposes;
 - i. availability of an evidentiary hearing to challenge information and the applicable rules of evidence and burdens of proof at such a hearing;

- j. disposition alternatives available to the juvenile court and the various agencies that serve youth and families that can provide treatment, placement and other dispositional services that may be required, such as anger management counseling, individual therapy, and sex offender treatment;
 - k. that the youth's parents may be court ordered to participate in the youth's counseling or attend counseling or drug or alcohol treatment themselves, as well as being required to pay support for the youth while in out-of-home care or incarceration;
 - l. participation that victims and prosecution or client's witnesses may have in the sentencing or dispositional proceedings;
 - m. witnesses that may be called by counsel, such as family members, teachers, ministers or others who have worked with the client;
 - n. the admissibility of other evidence, such as letters of support, education or medical records, or evidence of participation in community or church activities.
3. Counsel should:
- a. inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences thereof;
 - b. maintain regular contact with the client prior to the sentencing hearing and keep the client informed of the steps being taken in preparation for sentencing;
 - c. obtain from the client information such as the client's background and personal history, prior criminal record, employment history and skills, education, medical history and condition, financial status, and sources through which the information can be corroborated;
 - d. determine with the client whether to obtain an independent psychiatric, psychological, educational or neurological or other evaluation for sentencing or dispositional purposes;
- e. if the client is being evaluated, whether by the state or at counsel's request, counsel should call or write the evaluator in advance to provide favorable background information for the evaluator's use and to request that the evaluator address the client's emotional, educational and other needs as well as alternative dispositions that will best meet those needs and society's needs for protection;
 - f. ensure that the client who is being evaluated understands the process, is not frightened, and is encouraged to cooperate;
 - g. prepare the client to be interviewed for a presentence or dispositional report;
 - h. inform the client of the client's right to address the court at sentencing or disposition and inform the client of the possible consequences that admission of guilt may have upon an appeal, retrial or trial on other offenses;
 - i. ensure that the client has adequate time to examine the presentence report or dispositional report;
 - j. inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;
 - k. collect documents and affidavits to support the client's position, prepare witnesses to testify at the sentencing or disposition and request the opportunity to present tangible and testimonial evidence.
4. Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or dispositional report. In addition, counsel should:

- a. provide to the official preparing the report relevant information favorable to the client, including the client's version of the offense;
 - b. take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;
 - c. request permission to see copies of the report prior to transmittal to the court to be sure that the information challenged has actually been removed from the report.
5. Counsel should determine whether the prosecution will advocate that a particular type or length of sentence or disposition be imposed.
 6. If a written sentencing or disposition memorandum is submitted by the prosecution, counsel should verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reason for not doing so.
 7. When the court has found evidence sufficient to support jurisdiction in a delinquency case, counsel should, when appropriate, ask the court not to exercise jurisdiction and move to dismiss the petition on the ground that jurisdiction is not in the best interests of the youth or society.
 8. Counsel should prepare and present to the court a sentencing or disposition memorandum where there is a strategic reason for doing so.
 9. Counsel should be prepared at the sentencing or disposition proceeding to take the steps necessary to advocate fully for the requested sentencing or disposition and to protect the client's interest.
 10. Counsel in delinquency cases should be prepared to present evidence on the reasonableness or unreasonableness of OVA or SOSCF's efforts and alternative efforts that could have been made, and where appropriate request a "no reasonable efforts" finding by the court.
 11. In the event facts will be disputed at sentencing or disposition, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.
 12. Where information favorable to the client will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses.
 13. Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement, credit for time served, good time credits, and against the deportation of the defendant.
 14. Where appropriate, counsel should prepare the client to personally address the court.

STANDARD 2.11 — Post-disposition Procedures

Counsel should be familiar with the procedures available to the client after disposition.

Implementation

1. Counsel should be familiar with the procedures to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.
2. Counsel should inform the client of his or her right to appeal the judgment and/or the sentence or disposition of the court and the action that must be taken to perfect an appeal. In circumstances where the client wants to file an appeal but is unable to do so without the assistance of

counsel, the attorney should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the client's right to appeal.

3. Where a client indicates a desire to appeal the judgment and/or sentence or disposition of the court, counsel should inform the client of any right that may exist to be released pending the disposition of the appeal.
4. Where a custodial sentence has been imposed, counsel should consider requesting a stay of

execution of the judgment to permit the client to report directly to the place of confinement.

5. Counsel should inform the client of procedures available for requesting a discretionary review of or reduction in the sentence imposed by the trial court, including any time limitations that apply to such a request.
6. Counsel should inform the client of any procedures available for requesting that the record of conviction be expunged or sealed.

Performance Standards

Chapter 3

Specific Standards For Representation In *Juvenile Dependency Cases*

This Chapter pertains to representation of children and parents in juvenile dependency cases. These cases are primarily civil in nature and procedure, but are often referred to as "quasi-criminal" because of the significance of the rights and deprivations involved. At stake for children is their liberty, their right to membership in their family of origin and their right to be safe, healthy and protected. At stake for parents is their right to raise their children as they think best without state interference, and ultimately, the absolute and final termination of their parental rights.

Practice in juvenile dependency cases is unique and challenging, requiring continual training to assure the best legal representation of clients. Juvenile dependency cases may be as different and varied as the children and families involved in them. These training and practice standards are intended to help attorneys better meet the needs of their clients in juvenile dependency cases, and to improve the level of practice in these cases. The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings. These Standards recognize the importance of independent representation for children in juvenile dependency cases, and advocate for counsel to represent the child's articulated position in all but the exceptional case.

STANDARD 3.1 — Prerequisites For Representation

Counsel should be proficient in applicable substantive and procedural juvenile law and should have

appropriate experience, skill and training for the type of representation required.

Implementation

1. Every dependency case is different and varied approaches may be required in the legal representation of a child or parent. Effective legal practice in dependency cases requires a wide variety of skills unique to this practice.
2. In addition to meeting the requirements for experience and training contained in Standard 1.1, *supra*, counsel for children, parents or guardians in dependency cases should:
 - a. meet the requirements of the QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT INDIGENT PERSONS AT STATE EXPENSE, Oregon Judicial Department (1990), Standard 3.1 G, which provides, *inter alia*, that an attorney is qualified for appointment to juvenile cases, under ORS Chapter 419, if he or she:
 - i. For all cases, has knowledge of juvenile justice statutes, case law, standards, and procedures; has observed at least one contested juvenile court case; is generally familiar with services available to children and parents in the juvenile system; and has reviewed and is familiar with the following materials:

- 1) *Oregon Revised Statutes*, Chapter 419, Oregon Juvenile Code.

- 2) *Oregon Revised Statutes*, Chapter 417, Interstate Compact on Juveniles and the Community Juvenile Services Act.
 - 3) *Oregon Revised Statutes*, Chapter 418, Child Welfare Services and Reporting of Child Abuse.
 - 4) *Oregon Revised Statutes*, Chapter 420, Juvenile Training Schools and Youth Care Centers.
 - 5) Oregon State Bar, *Juvenile Law* (1984, Supp. 1988).
 - 6) Pub. L. 96-272, Adoption Assistance and Child Welfare Act of 1980.
 - 7) Pub. L. 95-608, Indian Child Welfare Act of 1978, 25 USC secs. 1901-1963 (1982).
 - 8) Education of the Handicapped Act of 1975, 20 USC secs. 1400-1485 (1982, Supp. 1987).
 - 9) Pub. L. 93-112, Title V, sec 504, Rehabilitation Act of 1975, 20 USC sec. 794 (1982).
- b. be familiar with:
- i. the causes and available treatment for child abuse and neglect;
 - ii. the child welfare and family preservation services available through State Offices for Services to Children and Families (formerly Children's Services Division (CSD) referred to hereinafter as SOSCF) and available in the community and the problems they are designed to address;
 - iii. the basic structure and functioning of SOSCF and the juvenile court, including court procedures, the functioning of the Citizen Review Boards (hereinafter referred to as CRB) and Court Appointed Special Advocates (hereinafter referred to as CASA) programs.
- c. Counsel new to dependency cases are encouraged to work with a mentor for the first three months and at a minimum should observe or co-counsel each type of dependency hearing from shelter care through review of permanent plan prior to accepting appointments.
 - d. In termination of parental rights cases, counsel for children or parents must meet the standards for dependency cases and have handled dependency cases for a minimum of six months as a full-time juvenile defender or must have handled at least 25 juvenile dependency cases that have gone past the jurisdictional phase.
3. Counsel should develop a basic knowledge of child development and adequate communication skills to communicate with child clients and witnesses.
- a. Interviewing techniques should be age appropriate and take into consideration the type of abuse the child is alleged to have suffered.
 - b. Communicating with a child client, especially with regard to legal matters, may require efforts beyond those normally required for effective communications with adult clients. Counsel for children should therefore be especially sensitive to the child's stage of development, including:
 - i. cognitive, emotional and social growth stages;
 - ii. level of education;
 - iii. cultural context; and
 - iv. degree of language acquisition.
 - c. Knowledge of the basic stages of child development will help counsel develop sensitivity and age-appropriate communication skills.
 - d. As with any client, counsel may advise the child client about their position in the case, but counsel should recognize that the child

- client may be more susceptible to intimidation and manipulation, and should ensure that the client's ultimate decision actually reflects the child's actual desires.
4. Counsel for children, parents or guardians in dependency cases should also visit at least two of the following:
 - a. a shelter home or facility;
 - b. a foster home;
 - c. a group home;
 - d. a residential treatment facility;
 - e. the Oregon State Hospital Child or Adolescent Psychiatric Ward; or
 - f. an outpatient treatment facility for children.
 5. All attorneys representing children, parents or guardians in dependency cases should average at least 15 hours of Continuing Legal Education (CLE) each year, at least 8 hours of which should relate to the practice of juvenile law.
 - a. Counsel are encouraged to seek training in the subject areas listed in Implementation 2, 3 and 4 *supra*.
 - b. Counsel are also encouraged to seek training in the following areas:
 - i. substance abuse and resources for substance abusing families;
 - ii. cultural and ethnic differences as they relate to child rearing;
 - iii. government benefits available in dependency cases, such as Social Security payments including non-needy relative grants, AFDC and AFDC-FC, Adoption Assistance Programs, and crime victims programs;
 - iv. Independent Living Programs;
 - v. emancipation laws and programs;
 - vi. Family Preservation Services;
 - vii. resources for the diagnosis and treatment of sexual abuse, physical abuse, and emotional abuse;
 - viii. patterns of child growth as related to neglect;
 - ix. resources for the treatment and recognition of non-organic failure to thrive;
 - x. Educational, mental health and other resources for special needs children;
 - xi. the use and appropriateness of psychotropic drugs for children;
 - xii. domestic violence, its effect on children and appropriate resources;
 - xiii. immigration law issues in juvenile court;
 - xiv. transitional aspects of placement and the child's return home;
 - xv. the importance of placing siblings together when appropriate;
 - xvi. the appropriateness of various types of placement;
 - xvii. the efforts that should be made to ensure a smooth, timely transition;
 - xviii. the effect of the placement on visitation by parents, siblings and other relatives;
 - xix. the effect of the placement on the service needs of the child;
 - xx. the transracial, transcultural and language aspects of the placement;
 - xxi. risk assessment prior to reunification;
 - xxii. the basics of case planning;
 - xxiii. accessing private insurance for services;
 - xxiv. consolidated cases in the family court;
 - xxv. the Indian Child Welfare Act, Native American families and appropriate resources;
 - xxvi. the Uniform Child Custody Jurisdiction Act (UCCJA);

- xxvii. the Parental Kidnapping Protection Act;
- xxviii. the Interstate Compact for the Placement of Children;
- xxvix. the Interstate Compact on Juveniles;
- xxx. guardianships;
- xxxi. adoption placement preferences.

STANDARD 3.2 — General Duties And Responsibilities Of Counsel To Client; Avoiding Conflict Of Interests

Counsel or counsel associated in practice should not represent two or more clients who are parties to the same or consolidated juvenile dependency cases unless it is clear there is no conflict of interest between the parties. Counsel should act in a professional manner in zealously advocating the client's position.

Implementation

1. Counsel should comply with Standard 1.2, Implementation 5, *supra*. Counsel should be especially cautious when accepting representation of more than one parent, guardian or child. Counsel should avoid representing both parents in dependency cases and should never represent both parents in cases that involve allegations of sexual, physical or emotional abuse, or when the interests of the parents may be adverse. Counsel should avoid representing multiple siblings when their interests may be adverse and should never represent siblings where it is alleged that one sibling has physically or sexually abused another sibling. Child clients may not be capable of consenting to multiple representation even after full disclosure.
2. Counsel should preserve the attorney-client privilege and not disclose, without the client's permission or as otherwise provided by law, confidential information. Counsel should try to avoid publicity connected with the case. Counsel should be cognizant of the emotional nature of these cases, the confidential nature of the proceedings and the privacy needs of the client.
3. Counsel should initiate and answer all correspondence and telephone calls which are necessary to the effective representation of the client.
4. Counsel should avoid ex parte communication regarding pending cases with the judicial officer before whom the case is pending.
5. Counsel should maintain professional decorum when appearing before the juvenile court. Counsel should identify for the record any person who is present in the courtroom on behalf of a client.
6. Counsel may not contact represented parties without the consent of their counsel.

STANDARD 3.3 — Role Of Counsel

It is the duty of counsel to determine whether a child client is capable of considered judgment. If counsel determines that the child is not capable of considered judgment, counsel should advocate what is in the client's best interests.

When representing parents and children capable of considered judgment, counsel should seek the lawful objectives of the client and should not substitute counsel's judgment in those case decisions that are the responsibility of the client.

Implementation

1. In determining whether a child is capable of considered judgment, counsel should consider:
 - a. the child's chronological and intellectual age;
 - b. the child's developmental stage;
 - c. the child's sophistication and experience;
 - d. whether the child is articulating a position concerning the issues of the case; and
 - e. the presence of undue influence.
2. Whether a child is capable of considered judgment and able to contribute to a determination of their position in the case depends on the

context and circumstances at the time the position must be determined. A child may be able to determine some positions in the case but not others.

3. Ideally, a guardian ad litem should be appointed in every case in which the child is incapable of considered judgment. These standards suggest, but do not require such appointments because of the expense associated with such appointments and the long-term practice in Oregon courts of not appointing guardians ad litem in juvenile court cases.
 - a. Where a guardian ad litem has been appointed, primary responsibility for determination of the posture of the case rests with the guardian ad litem and the child.
 - b. Where a guardian ad litem has not been appointed, counsel should consider asking that one be appointed and consideration should be given to appointment of an appropriately trained CASA or other qualified volunteer as guardian ad litem.
4. When representing parents and children capable of considered judgment, decisions that are ultimately the client's to make include whether to:
 - a. admit the allegations of the petition;
 - b. agree to jurisdiction, wardship and temporary commitment to SOSCF;
 - c. accept a conditional postponement; or
 - d. agree to specific services or placements.
5. Counsel should advise the client concerning the probable success and consequences of adopting any posture in the proceedings. It is the duty of counsel to give the client the information necessary to make an informed decision, including advice and guidance, but to not overbear the will of the client. Counsel may not advocate a position contrary to the client's expressed position.
6. When representing parents and children capable of considered judgment, counsel is bound by and should advocate for the client's definition of his or her interests, and may not substitute

counsel's judgment for the client's, nor ignore the client's wishes because they are perceived not to be in the best interests of the child.

7. If the client is not capable of considered judgment and a guardian ad litem has not been appointed, counsel should inquire thoroughly into all circumstances that a careful and competent person in the child's position should consider in determining the child's best interests with respect to the proceeding. After consultation with the child, the parents (where their interests do not appear to conflict with the child's), and any other family members or interested persons, such as the caseworker or child's therapist, counsel shall advocate what counsel determines to be the best interests of the child.
8. Where there is a conflict between what counsel has determined would be in the best interests of a child who is not capable of considered judgment, and the child's stated desires, counsel must to the greatest extent possible resolve the conflict by working with the young client, although this sensitive issue cannot always be avoided or completely resolved. If unable to resolve the conflict, counsel should communicate the child's wishes to the court but advocate for what counsel determines to be the best interests of the child.
9. Unless inconsistent with the client's interests, counsel should cooperate with other parties to the case.

STANDARD 3.4 — Obligations Of Counsel Regarding Pre-trial Placement

When a child has been removed from the parent's home and placed in shelter care, counsel should advocate for the placement order and other temporary orders the client desires, unless the client is a child incapable of considered judgment, in which case, counsel should advocate for the placement order and other temporary orders that are in the best interests of the child.

Implementation

1. Counsel should be familiar with statutory and case law that requires SOSCF to make reasonable efforts to prevent removal of a child and that removal is only allowed in cases of imminent danger.
2. Counsel should be familiar with the types of placements available to children and placement issues including:
 - a. the necessity of placement;
 - b. alternatives to placement;
 - c. relative placement;
 - d. the impact of removal and placement on the child;
 - e. the importance of placing sibling together when appropriate;
 - f. the appropriateness of the placement;
 - g. efforts that can be made to ensure a smooth transition to a new placement;
 - h. the effect of the placement on visitation;
 - i. the effect of the placement on service needs of the child or family; and
 - j. the transracial, transcultural and language aspects of the placement.
3. At the shelter care hearing, counsel should:
 - a. obtain copies of all relevant documents;
 - b. take time to talk to the client, asking for a recess or continuance if necessary;
 - c. assist the client in exercising his or her right to an evidentiary hearing to demonstrate to the court that the child can be returned home without further danger of suffering physical injury or emotional harm, endangering or harming others, or not remaining within the reach of the court process prior to adjudication;
 - d. where appropriate, present facts and arguments regarding:
 - i. jurisdictional sufficiency of the petition;
 - ii. adequacy of notice provided to parties, particularly if they are not present;
 - iii. the necessity of shelter care;
 - iv. why continuation of the child in the home would be contrary to the child's welfare or why it is in the best interest and for the welfare of the child that the child be removed from home or continued in care;
 - v. whether reasonable efforts were made to prevent removal;
 - vi. whether reasonable and available services can prevent or eliminate the need to separate the family;
 - vii. whether the placement proposed by SOSCF is the least disruptive and most family-like setting that meets the needs of the child;
 - viii. the possibility of placement with appropriate non-custodial parents and relatives;
 - ix. a plan for release of the child prior to the jurisdictional hearing;
 - x. if the child remains in shelter care, arrangements for visits and alternatives to shelter care to be explored such as relative placement, intensive in-home services and mediation.
- e. propose return to parents or placement that is the least restrictive with regard to the client.
4. If a child is returned to parents or placed in shelter care or other state placement, counsel for the child should assure that the child's needs for safety and right to receive treatment are met by the child's caretakers or agencies responsible for the child's care. Counsel should inform the Court, SOSCF and the caretakers for the child about any medical, psychiatric, or security needs of the client.

5. Counsel should request any temporary orders which the client desires or, if representing a child not capable of considered judgment, which are in the best interests of the child, including:
 - a. temporary restraining orders including orders expelling an allegedly abusive parent from the home;
 - b. orders governing future conduct of the parties, i.e. remaining clean and sober while the child is present, etc.;
 - c. orders for any services agreed upon prior to adjudication;
 - d. visitation orders that are reasonable and flexible and take into consideration the parties' work and counseling schedules and available transportation and that specify the terms and conditions of visitation;
 - e. orders for the parent(s) to pay child support if appropriate;
 - f. orders for SOSCF to investigate relatives and friends of the family as potential placements, or to place sibling groups together; and
 - g. Orders for the agency to provide appropriate treatment for the child.
6. Counsel should inform the client of the possibility for rehearing of the shelter care order or appeal from a shelter care order of a referee to a judge and the possibility of pursuing a *writ of habeas corpus*.
7. If the court sets conditions of the child's placement, counsel should explain to the client and any third party the conditions and potential consequences of violating such conditions. Counsel should seek review of shelter care decisions every ten days or as appropriate and advise clients or any third parties of changes in conditions for pre-trial placement that would be likely to get the Court to agree with the client's plan.
8. Counsel should ask the court to inquire of parties concerning the paternity of the child and the applicability of the Indian Child Welfare Act

(ICWA) or the Uniform Child Custody Jurisdiction Act (UCCJA).

STANDARD 3.5 — Initial Client Interview And Client Contact

Establishing and maintaining a relationship with the client is the foundation of the attorney-client relationship. Counsel should conduct an initial interview of the client within 72 hours and maintain regular contact with the client throughout the case.

Implementation

1. Counsel should comply with Standard 1.2, Implementations 1, 2 and 3, and Standard 1.3, *supra*, and in addition, upon being retained or appointed, counsel should make an initial contact with the client or the client's caretaker within 24 hours and, where appropriate conduct an initial interview within 72 hours. At the initial interview, counsel should explain to the client in age appropriate language:
 - a. juvenile court and SOSCF procedures;
 - b. the client's rights;
 - c. the role and responsibilities of the attorney;
 - d. the role of each player in the system;
 - e. alternatives and options available to the client;
 - f. the consequences of selecting one option over another.
2. Counsel should give the client time to ask questions and consider the alternatives. Counsel should obtain information from the client about:
 - a. the client's prior contacts with SOSCF;
 - b. the client's knowledge about the allegations of the petition;
 - c. the accuracy of information provided by the state supporting the petition;
 - d. alternative or additional allegations that should be added to the petition;

- e. services provided prior to removal or intervention;
 - f. reasons for removal or intervention;
 - g. services the client feels would have avoided the need for removal;
 - h. alternatives to removal including relative placements, in-home services or removal of the perpetrator;
 - i. current efforts to reunify the family;
 - j. family history including identity of prior caretakers of the child;
 - k. services needed by the child, parents or guardians;
 - l. the client's concerns about placement;
 - m. the client's long and short-term goals;
 - n. current visitation and the client's desires concerning visitation;
 - o. whether the client wishes to attend the hearing and if the client is a child, whether the client wishes to address the court outside the presence of the other parties;
 - p. the applicability of the Indian Child Welfare Act and relevant other cultural, religious, social and sexual preference issues; and
 - q. any other relevant information.
3. Counsel representing a child should gather information from the child and the child's caretakers, caseworker and therapist, if any, to assist in determining whether the child is capable of considered judgment.
4. All child clients should, at a minimum, be personally contacted by counsel and/or counsel's trained and qualified staff to determine the client's wishes, if possible, and to assess the client's well-being. It is important for counsel or counsel's staff to observe the child, the child's interactions with others in the home or foster home, and to assess the severity of the injuries and the child's general health and condition. Children four years of age or old enough to communicate should be personally interviewed in private by counsel. Interviews of children should occur away from court.
5. Counsel should have contact with clients:
- a. prior to court hearings and CRB reviews;
 - b. whenever notified that the child's placement is changed; or
 - c. when counsel is apprised of emergencies or significant events impacting the child.
6. For younger children, counsel, personally or through their staff, are encouraged to have regular face-to-face contact with the client in the child's home or foster home every three months or as needed. Older children should be contacted by phone, in their homes, at school or at the attorney's office with a similar frequency.
7. Counsel should confer with their clients as often as necessary after the initial interview to ascertain all relevant facts and otherwise necessary information. After counsel is fully informed on the facts and the law, counsel should advise the client concerning all aspects of the case.

STANDARD 3.6 – Independent Investigation

Counsel should conduct a thorough, continuing and independent review and investigation of the case, including obtaining information, research and discovery in order to prepare the case for trial. Counsel should not rely solely on the report of the caseworker.

Implementation

1. Counsel should, where appropriate, conduct an in-depth interview with the client covering:
- a. the events giving rise to the allegations in the petition;
 - b. the existence of witnesses or other potential sources of information; and
 - c. information about the child's current placement, condition and needs.

2. Counsel should be familiar with, and where appropriate, obtain the assistance of, local juvenile and mental health experts who can provide attorneys with consultation, evaluation of their clients or other parties, including parent-child interaction assessments, and testimony on issues in the case.
3. Counsel should have potential witnesses, including adverse witnesses interviewed, and where appropriate subpoenaed by an investigator or other appropriately trained person. If counsel conducts a witness interview, counsel should do so in the presence of a third person who can be available to appear as a witness at trial. Potential witnesses may include:
 - a. school personnel;
 - b. neighbors;
 - c. relatives;
 - d. caseworkers;
 - e. foster parents and other caretakers;
 - f. mental health professionals;
 - g. physicians; and
 - h. law enforcement personnel.
4. Counsel should confer with the attorneys for the other parties, and request permission to interview their clients with them present. When possible, counsel should interview parents and children in their home. Where appropriate, counsel or counsel's trained and qualified staff should observe visitations between parent and child.
5. When necessary, counsel should conduct or participate in depositions of witnesses.
6. Counsel should obtain information from representatives of other agencies with whom the family has been involved, either through SOSCF referral or on the family's own initiative, such as:
 - a. Community Health Nurses;
 - b. school personnel;
 - c. homemaker services;
 - d. family counselors;
 - e. parenting instructors;
 - f. drug or alcohol counselors;
 - g. neighbors;
 - h. ministers, priests, church members, etc.;
 - i. baby-sitters; and
 - j. other persons who have had significant contact with the child or family and may have relevant information.
7. Counsel should comply with discovery statutes and use the same to obtain names and addresses of witnesses, witness statements, results of evaluations or other information relevant to the case. Counsel should obtain and examine all available discovery and other relevant information, including:
 - a. the petition and juvenile court legal and social files;
 - b. information that is obtained through requests for discovery;
 - c. information from the SOSCF caseworker and from reviewing agency records for information about:
 - i. services provided by the agency in the past;
 - ii. visitation arrangements;
 - iii. the plan for reunification; and
 - v. current and planned services.
8. Counsel should obtain records concerning the family from other relevant sources such as:
 - a. schools;
 - b. hospitals and other medical records sources;
 - c. law enforcement agencies;
 - d. treatment agencies, including mental health and drug and alcohol treatment agencies; and

- e. psychiatrists, psychologists, therapists and counselors.
- 9. Where the client's participation in psychiatric, medical or other diagnostic or treatment program is significant in obtaining the client's desired result, counsel should so advise client.
- 10. Counsel should research and review relevant statutes and case law to identify defenses and legal arguments to support the client's case.
- c. orders for medical or mental health treatment;
- d. orders for change of placement;
- e. motions to increase, decrease or limit parental or sibling visitation;
- f. motions seeking child support; and
- g. motions seeking contempt for violations of court orders.

STANDARD 3.7 — Pretrial Motions

Counsel should research, prepare, file and argue appropriate pretrial motions or responses whenever there is reason to believe the client is entitled to relief. Counsel should file briefs or memoranda in support of such motions or responses.

Implementation

1. Counsel should make appropriate pretrial motions including:
 - a. discovery motions;
 - b. motions for medical, psychological or psychiatric evaluation, parent-child interaction, developmental or neurological assessment;
 - c. motions challenging the constitutionality of statutes and practices;
 - d. motions to strike, dismiss or amend the petition;
 - e. motions for interpreters;
 - f. evidentiary motions and motions in limine; and
 - g. motions to consolidate.
3. Counsel should seek protective orders, make appropriate motions in limine and other evidentiary motions.
4. Counsel should make motions to meet the client's needs pending trial, including:
 - a. restraining orders;
 - b. orders for family reunification services;

STANDARD 3.8 — Negotiating A Settlement

Counsel should participate in settlement negotiations to seek expeditious resolution of the case and to obtain petition and disposition terms favorable to the client.

Implementation

1. If the attorney concludes, after sufficient investigation, that the petition will probably be sustained, the attorney should so advise the client and request consent to discuss settlement of case. Counsel should seek petition terms that cast the client in the most favorable light.
2. Counsel should fully explain to the client the rights that would be waived by a decision to admit to jurisdiction, and keep the client fully informed of settlement negotiations. Counsel must convey to the client any offers made for settlement and the advantages and disadvantages of accepting the offers. Counsel may not accept any settlement without the client's authorization.
3. Counsel should be familiar with available mediation services and should consider whether the client's interests could best be served and whether the case could be more appropriately resolved by mediation or other settlement meetings.
4. Counsel should explain to the client the conditions and limits of the settlement, and the effect of the settlement on future actions such as criminal actions or termination of parental rights petitions.

STANDARD 3.9 – Hearings

Counsel should be prepared before and during hearings to provide quality representation and advocacy for the client.

Implementation

1. In most circumstances, counsel should have the client present at significant court hearings and reviews. However, in determining whether to have a child present at a hearing or review, counsel should carefully consider the impact of the hearing on the child. If a parent or child over twelve years of age is waiving their appearance, counsel should have them execute a written waiver. Counsel should prepare the client for their role in the hearing or review.
2. A decision to exclude a young child from a hearing or review is appropriate if the child does not want to attend, is too young to sit through the hearing, would be significantly traumatized by such attendance, or for other good reasons. Concerns about the child being exposed to some of the testimony can be addressed by having the child temporarily excluded from the courtroom.
3. Counsel should avoid unnecessarily requiring young children to testify in dependency adjudication, review or termination of parental rights hearings. If testimony is necessary, counsel should, where appropriate, agree to steps to reduce the trauma to the child, such as having the child testify in chambers.
4. In determining whether to have the child testify, the child's counsel should consider:
 - a. the child's need or desire to testify;
 - b. any likely repercussions of testifying;
 - c. whether the child is likely to be found competent to testify;
 - d. the necessity of the child's direct testimony;
 - e. the availability of other evidence which may substitute for the child's testimony; and
 - f. the child's developmental ability to testify and withstand cross-examination.
5. If the child is capable of considered judgment, counsel is bound by the client's decision concerning testifying.
6. Counsel should be familiar with current law and empirical knowledge about children's competency, memory and suggestibility as they relate to the child's competence to testify or the reliability of testimony or out-of-court statements.
7. Counsel for the child should prepare the child to testify including:
 - a. familiarizing the child with the courtroom and court procedures;
 - b. advising the child what to expect during direct and cross-examination;
 - c. ensuring that testifying will cause minimum harm to the child by:
 - i. seeking modification in the location of the testimony;
 - ii. limiting who will be present;
 - iii. restricting the manner and phrasing of questions posed to the child; and
 - iv. objecting to questions to the child that are not phrased in a syntactically and linguistically appropriate manner.
8. At the hearing counsel should be fully prepared by:
 - a. having all relevant materials available at the trial, including all pleadings, discovery and investigative reports, as well as, relevant statutes, caselaw, and the evidence code;
 - b. having marshaled facts and legal arguments to prove or disprove the allegations of the petition, assuring that there is factual support for each service element being sought.
 - c. having a draft or outline of:
 - i. opening and closing statements;

- ii. direct and cross-examination plans for all witnesses;
 - iii. amendments to the petition to be requested to conform the petition to the findings; and
 - iv. findings of fact and conclusions of law to be requested at the conclusion of the hearing.
9. Counsel should make appropriate motions, present and cross examine witnesses, offer exhibits, and provide independent evidence as necessary. During all hearings counsel should preserve legal issues for appeal, as appropriate.

STANDARD 3.10 — Disposition

Counsel should be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate or unfavorable information presented by other parties, ensuring that all reasonably available mitigating and favorable information is presented to the court and obtaining all appropriate orders to protect the client's rights and interests.

Implementation

- 1. Counsel should be prepared to participate fully in the dispositional hearing, which sets a course for the future of the case that will either result in reunification of the family or a severance of family ties. The attorney should counsel the client concerning the disposition prior to the hearing, including, explaining to the client the nature of the hearing, the issues involved, and the alternatives open to the court. Counsel should also explain fully the nature, obligations and consequences of any proposed dispositional plan.
- 2. Counsel should investigate all sources of evidence that will be presented at the hearing and interview material witnesses. Counsel also has an independent duty to investigate the client's circumstances, including such factors as previous history, family relations, economic condition and any other information relevant to disposition.
- 3. When the court has found evidence sufficient to support jurisdiction, counsel should, when appropriate, ask the court not to exercise jurisdiction and move to dismiss the petition on the ground that jurisdiction is not in the best interests of the child because the child and family do not require supervision, treatment or placement.
- 4. Counsel should advocate the least restrictive disposition possible which can be supported and is consistent with the client's needs and desires. Although a child's position may overlap with the position of one or both parents, third-party caretakers, or SOSCF, the child's counsel should be prepared to participate fully in any proceedings and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not be a mere endorsement of another party's position.
- 5. Counsel for the child should ensure that the court recognizes the need to speedily promote permanency for the child.
- 6. Counsel should, where appropriate, examine fully any witness whose evidence is damaging to the client's interests and challenge the accuracy, credibility and weight of any reports or other evidence before the court.
- 7. Counsel should be prepared to present a disposition plan that will achieve the client's desired ends. Counsel should be familiar with the dispositional alternatives available to the court and the various agencies that serve children and families that can provide placements, treatment, and other dispositional services and should fully discuss dispositional options, consequences and procedures with the client.
- 8. Counsel should secure the assistance of psychiatric, psychological, medical or other experts needed for purposes of evaluation, consultation or testimony about the dispositional plan. Counsel should obtain reports or subpoena evaluators or other expert witnesses to testify. Counsel

- should prepare the client for any evaluation by explaining the nature of the procedure and encouraging the client's cooperation.
9. Counsel should obtain the written Reports of the Juvenile Department, SOSCF, and the CASA sufficiently in advance of the dispositional hearing to prepare a response. Counsel should consider submitting a written dispositional report on behalf of the client to set out the client's plan and to counter information provided in other reports received by the court.
 10. At the hearing, counsel should, where appropriate:
 - a. request orders that benefit the client;
 - b. be prepared to present evidence on the reasonableness or unreasonableness of SOSCF's efforts and alternative efforts that could have been made;
 - c. request that a "no reasonable efforts" finding be made by the Court;
 - d. request an order specifying what future services will make the changes in the family needed to correct the problems necessitating intervention and constituting "reasonable efforts" by SOSCF;
 - e. request orders for services or service agreements that include:
 - i. family preservation services;
 - ii. medical and mental health care;
 - iii. drug and alcohol treatment;
 - iv. parenting education;
 - v. housing;
 - vi. recreational or social services;
 - vii. domestic violence counseling;
 - viii. anger management counseling;
 - ix. independent living services; and
 - x. other individualized services.
 11. Counsel should assure that the order includes a description of actions to be taken by parents to correct the identified problems. Counsel should request that the Court include in its order a timetable for accomplishing the changes required. Counsel should, where appropriate, seek Court approval of a written service agreement prepared by Counsel or SOSCF.
 12. Counsel should also request specific visitation orders covering visitation between child and parent, between siblings and between the child and other significant persons.
 13. Counsel should, where appropriate, request that the Court appoint counsel, a Court Appointed Special Advocate (CASA) or an educational advocate (Surrogate Parent) for the child. Where appropriate counsel should seek child support orders.
 14. Counsel should seek to ensure continued representation of the client at all further hearings and reviews. Counsel should request that the Court set the next date for the case to be reviewed.
 15. Counsel should assure that the client is informed of and understands the nature, obligations and consequences of the dispositional decision, and the need for the client to cooperate with the dispositional orders. Counsel should also explain the client's rights and possibilities of post-trial motions to reconsider, set aside, modify or review the disposition, as well as the right to appeal. Counsel should explain the consequences of violating the dispositional order and the continuing jurisdiction of the court.

STANDARD 3.11 — Post-disposition

The lawyer's responsibility to the client does not end with dismissal of the petition or entry of a final dispositional order. Counsel should be prepared to counsel the client and provide or assist the client to secure appropriate legal services in matters arising from the original proceeding.

1. Counsel should counsel the client and file any post-disposition motion or appeal that is needed.

2. Counsel should review the court's order to insure that it conforms with the findings and disposition.
3. Counsel should file, litigate or respond to any motions to reconsider, set aside, or modify the jurisdictional finding or disposition, as well as any appeals of referees' orders. Counsel should, as directed by the client, also file notice of appeal and either provide representation on appeal or assist the client in referral to other appellate counsel. Counsel should participate in an appeal filed by another party or assist the client in referral to other appellate counsel.
4. Counsel should monitor implementation of the caseplan and progress in the case, requesting additional services, seeking review or other relief, such as contempt, as appropriate. Counsel should be familiar with the procedures available to the client after disposition.
5. Counsel should monitor the case plan for implementation and maintain contact with both the client and the agency or institution involved in the disposition plan in order to ensure that the client's rights are respected and where necessary, to counsel the client concerning the dispositional plan.
6. Counsel should confer periodically with their client and the caseworker to review the service plan and service agreement, the extent of compliance with the plan by both the agency and the client, and the continued appropriateness of the plan. Where needed, counsel should request additional services for the client or family.
7. In monitoring the provision of dispositional services, counsel should request a review or permanent planning hearing if necessary to protect the client's interests. Counsel should investigate and prepare for review or permanent planning hearings as for adjudicatory hearings to the extent that is necessary. *See Standards 3.6 and 3.9, supra.*
8. Counsel for the child should file a petition for termination of parental rights when necessary or

advocate for the district attorney or attorney general to do so.

9. When the representation ends, counsel should explain why the representation is ending and how the client can obtain assistance in the future should it become necessary.

STANDARD 3.12 — Review Permanent Planning And Termination Of Parental Rights Hearings

Counsel's role is most critical at the review, permanent planning and termination of parental rights hearings, where decisions of whether the family will be reunited or permanently severed are made. Counsel should be fully prepared to represent the client at all reviews and must provide the most zealous and meticulous representation at the termination of parental rights stage of the proceedings.

Implementation

1. State and federal law requires that review hearings or CRB reviews occur at regular intervals. Clients are also entitled to request reviews, to assist them in moving the case along or addressing problems with the caseworker or caseplan. Counsel should seek a review to request return of the child when any event happens that may significantly affect the need for continued placement. Counsel should also request a review when court intervention is necessary to resolve a dispute over such matters as visitation, placement or services.
2. Whether a review is periodic or at the request of one of the parties, counsel should conduct appropriate investigation to prepare for the review, which may include:
 - a. reviewing the SOSCF file and the report prepared for the review and obtaining all relevant discovery;
 - b. interviewing the caseworker to determine his or her assessment of the case, the caseplan, the child's placement and progress, and the parent's cooperation and progress;

- c. contacting other agencies and professionals who are providing services to the child or parents;
 - d. interviewing other potential witness, which may include relatives, neighbors, school personnel and foster parents;
 - e. seeking evaluation of the client or other parties; and
 - f. subpoenaing needed witnesses.
3. At all review hearings and CRB reviews counsel should be prepared to present information on what the long-term plan for the child should be and whether SOSCF and the parents are taking the necessary steps to achieve the chosen plan in a timely fashion. Counsel should consider submitting a written report on behalf of the client. Counsel should specifically address:
- a. whether there is a need for continued placement of the child;
 - b. reasons the child can or cannot presently be protected from the identified problems in the home even if services are provided;
 - c. whether SOSCF is making reasonable efforts to rehabilitate the family and eliminate the need for placement of the child;
 - d. why services have not been successful to date;
 - e. whether the court-approved plan for the child remains the best plan;
 - f. whether the caseplan or service agreement need to be clarified or modified;
 - g. the appropriateness of the child's placement; and
 - h. whether visitation or other orders should be made or modified.
4. At all review hearings, CRB reviews and permanent planning hearings, counsel should request specific findings and orders that advance the client's case. Where appropriate, counsel should ensure that parents receive a clear and authoritative statement of what is expected of them, the time they have, the possibility of return of the child if sufficient progress is made, and the risk of termination if not. Counsel should ask the Court to set the time frame for the next hearing, if needed.
5. Permanent planning hearings require the same preparation as other reviews, but counsel should, in addition, be prepared to address what the long-term plan for the child should be, including:
- a. a specific date on which the child is to be returned home, or
 - b. a date on which the child will be placed in an alternative permanent placement;
 - c. whether the child will remain in foster care on a permanent or long-term basis, and
 - d. whether foster care will be extended for a specific time, with a continued goal of family reunification.
6. Counsel for the child should consider whether to file a termination petition on behalf of the child, or to join the state in prosecuting such a petition or the parent in defending such a petition. Because termination of parental rights is a drastic and permanent deprivation of the fundamental right of family membership, and only the death penalty is a more severe intrusion into personal liberty, counsel should be zealous and meticulous in investigating and preparing for termination of parental rights hearings. Counsel should prepare for and try termination of parental rights hearings as for adjudicatory hearings. See Standards 3.6, 3.7, 3.8, 3.9 and 3.11 *supra*. In addition, counsel should:
- a. thoroughly review the record of the case, carefully analyzing court orders and CRB findings and recommendations;
 - b. completely investigate the case especially issues unique to termination, such as the adoptability of the child and the child's ability to bond to new caretakers;

- c. prepare a detailed chronology of the case to use in case presentation and in developing a theory and strategy for the case;
- d. research termination statutes and case law with particular attention to constitutional issues and prepare trial memoranda if necessary;
- e. obtain and review records to be submitted to the court and prepare objections or responses to objections to these documents;
- f. subpoena and carefully prepare witnesses;
- g. be aware of the heightened standard of proof in termination cases -clear and convincing evidence for most cases and beyond a reasonable doubt in cases covered by the Indian Child Welfare Act;
- h. be prepared to present evidence of or address SOSCF's failure to adequately assist parents.

Performance Standards

Chapter 4

Specific Standards For Representation In *Civil Commitment Proceedings*

This chapter pertains to cases of involuntary commitment of the mentally ill. Under Oregon law, a mentally ill person is a person who, because of a mental disorder, is either dangerous to self or others or unable to provide for basic personal needs and is not receiving such care as is necessary for health or safety. The types of cases referred to in this chapter as "commitment proceedings" include initial commitment, re-commitment, conditional release, trial visit revocation, outpatient commitment, and "diversion" (a 14 day period of intensive treatment). Because it is generic, the term "commitment client" is used in this chapter in lieu of the term "allegedly mentally ill person."

Not addressed in this chapter are any specific standards that may apply to civil commitment of the mentally retarded. Nonetheless, counsel will find this chapter useful in cases involving involuntary commitment of the mentally retarded.

STANDARD 4.1 — Pre-requisites For Representation

In addition to being proficient in substantive and procedural law, counsel should possess knowledge, skill, training and experience commensurate with the nature of the allegations and the complexity of the case.

Implementation

1. At a minimum, counsel should meet the requirements of the Qualification Standards for Court Appointed Counsel to Represent Indigent Persons at State Expense, Oregon Judicial Department (1990), Standard 3.1 F.
2. Counsel should have basic knowledge of the classification of mental disorders (*Diagnostic and Statistical Manual of Mental Disorders [Fourth Edition Revised]*) and the ability to read and understand medical terminology related to mental disorders and the treatment of the mentally ill.
3. Counsel should be familiar with the medications used to treat mental disorders and, in particular, the effects of those medications on the client's participation.
4. Counsel should be aware of how a particular mental disorder will affect attorney/client communications. Counsel should recognize communications may require special efforts on the part of counsel.
5. Counsel should have familiarity with mental health resources and other resources available in the community that will provide an alternative to involuntary hospitalization.
6. Counsel should be familiar with the facilities, both inpatient and outpatient, that provide services to the mentally ill.
7. Counsel should frequently represent clients in commitment proceedings. If counsel is not frequently before the court representing commitment clients, counsel should observe local court proceedings and/or consult with counsel experienced in local commitment proceedings. Counsel should be familiar with local court practices.
8. Counsel should avail oneself of any CLE's or specialized training to further educate counsel on substantive issues, substantive law, statutory

law and procedures, local court rules, and local practices as they relate to commitment proceedings.

STANDARD 4.2 — Counsel's Role

It is counsel's role to act as a zealous advocate for the client's ultimate goals and objectives in the commitment proceedings and to advise the client on how best to achieve them.

Implementation

1. It is counsel's duty to ascertain the client's ultimate goals and objectives in the proceedings.
 - a. It is the unusual circumstance where the client cannot express the ultimate goal, i.e., "I want out of this hospital, jail, custody situation." Counsel should nearly always be able to ascertain if the client's desire is "liberty". If the client desires liberty, then counsel should work to achieve liberty.
 - b. Counsel should assume the role of advocate for the client's rights and not attempt to take on an additional role. Counsel is not the judge, the consensus of the community, the client's family member, the prosecutor or the mental health provider.
 - c. In those rare instances when a client, because of mental status, cannot express his or her ultimate goals and objectives in the commitment proceedings, it is the role of counsel to protect the client's constitutional and statutory rights.
2. Counsel should advise the client of probable successes and consequences of adopting any posture in the proceedings.
3. Counsel should assess whether counsel has the requisite training, skill, knowledge and experience to represent a commitment client in other types of legal matters before undertaking representation in such matters.
4. If counsel represents the commitment client in other types of proceedings, such as guardianship, conservatorship, or criminal proceedings,

counsel should assess how the client's participation and position in one proceeding may potentially affect the client's participation and position in other proceedings and advise the client accordingly. For example, if counsel represents a client in both a civil and criminal matter, it may potentially pose problems if counsel asserts a claim of mental disorder exculpating culpability in the criminal matter while on behalf of the same client counsel argues against a civil commitment because the client denies a mental disorder.

STANDARD 4.3 — Initial Client Interview

Upon being retained or appointed by the court, counsel should conduct an initial interview with the client as soon as possible, in most cases within 24 hours, but in all cases prior to the hearing.

Implementation

1. Counsel should ascertain where the client is located and visit personally. In many instances, the client will be detained in a hospital, jail, or locked care facility. In the remaining cases, the client will be located via the information contained in the citation or delivery warrant.
2. In the initial interview, counsel should:
 - a. clearly introduce herself to the client and make sure the client understands the role counsel plays in the civil commitment process and the difference between counsel's role and that of the state's attorney;
 - b. discuss the issue of client confidentiality and secure the client's oral and written permission to obtain access to relevant records;
 - c. explain the reason for the commitment proceedings and the possible results;
 - d. ascertain the client's desired resolution;
 - e. explain legal rights;
 - f. provide legal advice;
 - g. describe the likely course of events;

- h. prepare the client for a mental status exam by examiners appointed to aid the judge; and
 - i. describe the burden of proof and the findings the court must make in order to further deprive the client of liberty.
- 3. When counsel has ascertained the client's ultimate goal, counsel should advise the client of the available options and the probable success and consequences of choosing a particular option. For example, if the client wants discharge but in counsel's estimation is likely to be more successful in presenting a conditional release, that alternative should be presented to the client. Counsel should follow the client's desires as to which option to pursue.
- 4. Counsel should inform the client of:
 - a. the right to a postponement and the likelihood of continued detention during the postponement;
 - b. the right to subpoena witnesses, including expert witnesses;
 - c. the right to subpoena any physician who is, or has been, treating the client at the client's request and counsel's statutory obligation to do so under ORS 426.075(4);
 - d. the right to assert applicable privileges regarding confidential communications with a psychologist, psychiatrist, caseworker, physician, social worker or others, and the likely results of waiver of that privilege;
 - e. the right to have the investigator personally present at the hearing as a pre-requisite to admissibility of the investigator's report;
 - f. the right to object to the admissibility of hearsay in the investigator's report; and
 - g. the right to request a qualified examiner in addition to the one the Court is required to appoint.
- 7. If the proceedings are for a violation of trial visit or a violation of conditional release, counsel should describe the proceeding, the standard of proof required, the allegations before the Court, and advise the client of the consequences of a revocation.
- 8. If the proceeding is a re-commitment proceeding, counsel should inform the client of the right to protest re-commitment and require an independent medical examination.
- 9. If the client is detained because of a certificate for a 14 day period of intensive treatment, "diversion", counsel shall meet with the client and review the certificate within 24 hours of the filing of the certificate. Counsel shall inform the Court whether the client consents to or protests the certificate within one judicial day of the time the certificate is delivered to the Court. ORS 426.237(3)(c)
- 10. Counsel should inform the client in the applicable case of the fact that the Court may prohibit the client from possession of a firearm in the future.
- 11. Counsel should advise the client of the legal basis under which the Court will order:
 - a. discharge;
 - b. commitment;
 - c. conditional release;
 - d. revocation or modification of a trial visit;
 - e. outpatient commitment;
 - f. recommitment; and
 - g. the length of commitment.

STANDARD 4.4 — Obligations Of Counsel Pre-hearing

Counsel should obtain documents filed in the case, review reports and records of relevance, prepare pre-trial motions and engage in negotiations at the client's direction.

Implementation

- 1. Counsel should obtain and review where relevant the:

- a. court file;
 - b. investigation report;
 - c. medical records;
 - d. police reports; and
 - e. evidence offered by opposing counsel.
2. Counsel should conduct interviews with relevant witnesses prior to the hearing.
 3. Counsel should research, prepare, file and argue pre-trial motions to protect the client's statutory and constitutional rights:
 - a. counsel should review and challenge the substance and process of the initiation of the commitment proceedings:
 - i. counsel should ascertain if the notification of mental illness meets the statutory criteria for substance and process, including whether the notification is under oath, contains the factual basis for a commitment proceeding, meets the statutory requirements for a commitment proceeding, and comports with the timeliness provisions of the statute;
 - ii. counsel should review the notice and content of the investigator's report to see if they comport with the statutory requirements;
 - iii. counsel should review the notice and filing of medical records sought to be introduced; and
 - iv. counsel should review the basis for a warrant of detention and determine if the warrant is sufficient in its substance, execution and return.
 - b. counsel should challenge for bias the judge or mental health examiners, where appropriate.
 - c. counsel should be aware of the basis for and file a motion to seek release from custody in the form of a Petition for Writ of Habeas Corpus when appropriate.
 - d. counsel should be aware of the application of the rules of evidence in the commitment proceedings and litigate matters of admissibility of evidence by means of a motion in limine when appropriate.
 - e. counsel should make appropriate requests for extraordinary expenses for the services of experts when necessary.
 4. Counsel should ascertain whether the client may achieve the ultimate goal without the necessity of a contested commitment hearing. If appropriate in furtherance of that goal, counsel should:
 - a. seek to negotiate a satisfactory outcome with opposing counsel;
 - b. approach the mental health investigator about a dismissal or less restrictive resolution without the necessity of a hearing;
 - c. prepare and present a conditional release alternative;
 - d. prepare and present a stipulation to the basis for a commitment to the court; and
 - e. determine if a postponement will assist in achieving the client's desired resolution. counsel should seek the postponement at the client's request.

STANDARD 4.5 — Commitment Proceedings

Counsel should provide quality representation and advocacy for the client at commitment proceedings.

Implementation

1. At a hearing, counsel should be prepared to:
 - a. raise procedural motions, including the exclusion of witnesses at the client's request;
 - b. assert privileges, including the physician/patient, psychotherapist/patient, social worker/patient and other privileges;
 - c. protect against self-incrimination;
 - d. make an effective opening statement as to the client's ultimate goal and the facts that will be presented to support that goal;

- e. cross-examine and present expert and lay witnesses;
 - g. present a plan for discharge;
 - h. present alternatives, including conditional release, voluntary commitment and outpatient commitment, where appropriate; and
 - i. present stipulations.
2. In closing, counsel should argue strict application of the burden of proof and the law.
 3. At all times, counsel should endeavor to preserve the record for appeal.

STANDARD 4.6 — Obligations Of Counsel Post-hearing

It is counsel's responsibility to represent or obtain representation for any residual legal matters relating to the case.

Implementation

1. Counsel should take the necessary actions to effect an appeal at the client's request. Counsel should undertake to file a Notice of Appeal or assure that alternative counsel is appointed to perfect an appeal.
2. Counsel should assess any treatment issues that exist requiring legal intervention and, where appropriate, refer the client to the bar association, advocacy group, attorney general's office, legal aid, private counsel or other appropriate source.
3. Counsel should, where appropriate, inform the client of the existence of social services, such as housing and food available in the community, the existence and location of community mental health providers, and the existence of medical treatment available in the community upon discharge from a hospital.

Chapter 5

Maximum Caseload Standards For Defense Counsel

Background

The Indigent Defense Task Force recognizes that there have been, and will continue to be, a variety of providers of indigent defense in the State of Oregon. Because of that variety, it is not possible to determine an appropriate weighted caseload for all providers. The Task Force determined that the Metropolitan Public Defender (MPD) offers the model that is most efficient in terms of scale. The MPD is the largest office by volume of cases in the state, and is the most experienced in managing caseloads. The MPD has a high level of staff support and clerical support. These levels of staff and clerical support are not available in other settings and substantially increase the ability of counsel to handle cases. As a result, adjustments to factor in the lack of available resources are necessary in determining maximum caseloads in other settings.

In 1993, the MPD established a unit valuation system to determine the number of cases each attorney in the office could handle each year. The MPD system gave cases a unit value based on the anticipated time demands. Unit values range from 100 to 1. The MPD assumed in the valuation that a "mythical competent attorney" could effectively handle 600 units per year. The MPD, in its contract proposal of October, 1993, proposed these unit values and has worked with them under the contract that was awarded.

Established Unit Values

The first step in the process of determining a weighted caseload is to determine the *average* time demand expected of a particular type of case. This analysis assumes that some cases will take more time and other cases will take less and seeks to determine what the average time is only in relation to other cases. In other words, a minimum unit value is determined and unit values are attributed to each

type of case. In essence, unit values are a comparison of the expected time commitment for handling certain types of cases in relation to other types of cases. Obviously substantial felonies are expected to take more time than misdemeanors. The unit value analysis put forth by the MPD proposal seeks to compare time anticipated for relative types of cases.

Maximum Caseload Per Attorney Per Year

The second step in the analysis is to determine the maximum number of units that a criminal defense attorney working a full load, i.e. a full time equivalent (FTE) attorney, could handle over the course of a year. The MPD proposal assumed that the "mythical competent defense attorney" could handle 600 units per year. This meant that in applying the unit valuation tables, a full caseload for an attorney would be 6 felony level 11 cases in one year or at the other end of the spectrum, 600 drug diversion cases in one year.

Assumptions

As stated in the introductory paragraph of this Chapter, the MPD has a high level of staff support. This reaches the level of one investigator and one trial assistant per attorney for felony and juvenile cases and .5 investigator and .5 trial assistant per attorney for misdemeanor cases. Where office support staff is less, corresponding adjustments would have to be made in determining the maximum caseload of a public defender office. Because the private bar does not handle the volume that would create the efficiencies derived through the MPD system, the maximum caseload values have little relevancy to private bar providers.

Additional Reasons for Adjustments

The MPD has unique circumstances that do not exist outside Multnomah County. The physical proximity

of jail, courthouse, District Attorney and defender office, combined with the physical proximity of crime scenes and witnesses, virtually eliminate travel.

The concentration of volume allows for specialization within the office. This reduces the need for legal research. It also reduces time committed to plea bargaining, as the volume of similar cases that have gone before establish the likely results and penalties.

All counties other than Multnomah County have less case volume and greater travel time. Inefficiencies increase as either volume decreases or travel increases. As a result, the maximum caseload standards in this report would be impossible to approach outside of Multnomah County.

Conclusion

The Committee believes that the MPD proposal is a reasonable one to adopt as a *maximum* caseload standard in that the MPD office proposal was developed in Oregon by the largest and best staffed public defender office, which is believed to have maximum caseload-handling capability. It is anticipated that adjustments would be appropriate for defender offices that do not have the same amount of support staff per lawyer or the same volume of cases. Further adjustments would have to be made for less than full-time attorneys and private attorneys who are taking conflict cases as a part of their practice. The adoption of a unit valuation system and a maximum caseload per FTE defense attorney is meant to be a guide, subject to review.

Table Of Unit Values And Corresponding Maximum Caseload Per Attorney Per Year For Large Volume Defense Practice (MPD) In Multnomah County

Case Year	Unit Valuation	@600/Atty/Yr	Case Year	Unit Valuation	@600/Atty/Yr
Felonies			Remand	60	10
Felony Level 11	100	6	PV	0.5	1200
Felony Level 10	15	40	Adult Termination of Parental Rights	60	10
Felony Level 9	15	40	Child Termination of Parental Rights	30	20
Felony Level 8	4	150	Adult Dependency	7.5	80
Felony Level 7	2.5	240	Child Dependency	5	120
Felony Level 6	2.5	240	Review Hearings	0.75	800
Felony Level 1-5 - includes contempt	2	300	Citizen's Review Board Hearings	0.75	800
Fugitive	1	600	Indian Child Welfare Act Cases		
Felony PV	1	600	Adult Termination of Parental Rights	65	9
Misdemeanors			Child Termination of Parental Rights	32	19
Msd- includes misdemeanor traffic cases	1.5	400	Adult Dependency	8	75
Msd PV	1	600	Child Dependency	5.5	109
Juvenile			Review Hearings	1	600
Delinquency			Citizen's Review Board Hearings		
Level 11	100	6	Civil Commitment	1	600
Level 8-10	7.5	80	Drug Diversion (STOF)	1	600
Level 1-7	1.25	480			
Misdemeanor	0.75	800			

Appendix

OSB Indigent Defense Task Force On Defense Standards Survey Results

The OSB Indigent Defense Task Force conducted surveys of judges, defense attorneys, prosecutors, and probationers with respect to criminal defense representation. The purpose of the surveys was to assist the task force in evaluating the strengths and weaknesses of the existing indigent defense system. The surveys did not address representation in juvenile dependency, delinquency or involuntary commitment proceedings.

Part One of this Appendix provides a sampling of the survey results and comments. With respect to surveys completed by judges, defense attorneys, and prosecutors, the results reported in this section are those that pertain to the quality of services provided by criminal defense attorneys in general, and by retained defense counsel and state-paid defense counsel, specifically. Probationers were not asked the same questions asked of judges, defense attorneys and prosecutors regarding quality of representation. The sampling of probationers' survey responses that are included in Part One shows the types of services that received the highest number of "excellent" ratings and those that received the highest number of "poor" ratings by probationers.

Part Two of this appendix provides tabulations of all of the survey results.

Part Three contains a copy of the survey document used for each of the four different surveys.

Part Four is a report received by the task force from a federal inmate who, at the suggestion of a task force member, conducted an informal survey of federal inmates at the Sheridan, Oregon facility, with respect to quality of criminal defense representation.

Appendix Part One — Sampling Of Survey Results And Comments

NOTE: The surveys submitted to judges and prosecutors contained two questions (#1 and #5) concerning the quality of representation in indigent defense criminal cases which were essentially the same. Because the tabulation of responses to each of the two questions, however, were not exactly the same, the responses only to Question #5 are presented below.

I. Responses From Judges

OSB Task Force surveys were mailed to all one-hundred fifty (150) Circuit and District Court judges. Sixty-seven (67) surveys were returned. Twenty-six (26) different counties were represented in the sample.

It appears a sufficient diversity of geographic responses were obtained so that all forms of indigent defense delivery systems utilized in Oregon were identified by one or more judges as the "primary

form" of indigent defense delivery system in their jurisdiction. Of the four groups surveyed, judges provided the most written comments.

Results With Respect To Quality Of Representation

The judge respondents rated the quality of legal representation in **all criminal defense cases** (retained and indigent defense) as:

Excellent	12
Good	54
Fair	6
Poor	0

The quality of representation in **indigent defense criminal cases** was rated as:

Excellent	17
Good	47
Fair	10
Poor	1

The quality of representation in **retained criminal cases** was rated as:

Excellent	21
Good	47
Fair	3
Poor	0

Sample Comments — Judges

We are asking a few attorneys to take on the bulk of indigent defense at minimal compensation; some attorneys can adequately handle the caseloads, some have problems keeping up with caseload.

Too many cases for too few people. Not enough funding to cover increases in crime severity or sanctions that prevent plea bargaining.

Lack of client control; unwillingness to initiate plea discussions (defense counsel wait for DA to make offer); unwillingness of some to follow discovery rules; not understanding evidentiary rules; making frivolous sentencing arguments or release arguments.

Cases get tried that should have pled.

Too much plea bargaining with superficial understanding of facts.

The public defender's office is excellent, but new attorneys on the list add energy and aren't stale. There needs to be a balance between experience and energy versus experience and passivity. * * * The level of

experience in the public defender's office and the willingness to mentor new lawyers is terrific.

No effective means of excluding the few incompetents.

Too much for lawyers to do spreads them far too thinly and mistakes, sometimes serious, happen. The lawyers need less clients/cases so as to perform adequately within time lines. They are handling more and more work/clients/cases with less and less resources. Inadequate client contact pre-trial affects seriously (and negatively) the perception of fairness by the client. Generally, the retained lawyer has more time/resources to apply to the representation and often can be 'more motivated' to attend to details important to the client.

Cases get tried that should have pled. Counsel is sometimes too slow — over tries case. Counsel is harried with too big a caseload — results in anger and unprofessional conduct.

Lack of adequate preparation and time spent with client. This is especially true on probation violation matters. Newer attorneys sometimes lack adequate training in the fundamentals of trial practice and evidence. Overall, they all seem overworked.

At times, many times retained attorneys *wander* into the criminal world and don't do half the job court-appointed attorneys do.

Some retained attorneys are excellent — few if any appointed lawyers are. This is to be expected, is realistic and appropriate. Appointed clients should expect reasonable representation. Monied clients should expect excellent representation.

Court-appointed defense attorneys seem more motivated by moving a lot of cases (being paid per case and not per hour) than by providing quality representation. I think the flat fee-per case approach is a bad way to deliver indigent defense services. It places the attorney in a conflict of interest with the client/defendant: the attorney, in order to promote his economic well-being, must move the cases quickly. The more time he spends on a particular case, the less money he makes, in effect. The only way to balance these concerns with the State's concern in keeping control over indigent defense budg-

ets is to have a system of public defender offices where the attorneys are salaried.

My only concern is adequate funding — this year there were more cases than had been contracted to handle.

Good smart lawyers who try hard. They carry a heavy load and burnout can be a problem. They are ethical and truly care for their clients.

Defense bar does not put up enough of a fight — there is an absence, in most cases, of a truly *vigorous* representation. You get what you pay for. Preparation, vigor and overall competence is greater in retained cases, with occasional exceptions.

Lack of information about sentencing options suitable for defendants.

There is generally a good professional working relationship between the defense bar and the prosecution. Without this, we would be in serious trouble. The other point that comes to mind is that both the public defender's office and the district attorney's office are staffed with competent, experienced people.

Two chief areas of concern: (1) costs for experts and investigators, etc.; (2) lawyers taking too many cases on a small dollar margin in order to get contracts

Increasing caseload with limited defense panel. Measure 11 cases will require more attorney and court time. Death penalty cases are consuming the qualified defense attorneys. I believe for the dollars spent the indigent defendant is often better represented than the retained client at a much higher fee.

The public defenders are honest, ethical, and attempt to do a good job. They lack overall experience due to their youth. I actually believe in many cases [defendants] do better with the public defender. That is why we lobbied [the State Court Administrator] to switch our county from a consortium of private attorneys to a public defender.

Insufficient time explaining process to clients.

II. Responses From Defense Attorneys

OSB Task Force surveys were distributed to members of the Oregon Criminal Defense Lawyers' Association (OCDLA) via a general member mailing. Forty-two

(42) completed surveys were returned. About two-thirds of the returned surveys were from attorneys who identified themselves as private practitioners as opposed to public defenders.

Thirteen (13) counties were represented in the returned surveys. Of the five largest counties by general population, no surveys were returned from Marion County. Significant geographical diversity was obtained and the answers appear to reflect general trends versus unique differences based on the geography or population of the area.

Results With Respect To Quality Of Representation

The criminal defense lawyer respondents rated the quality of legal representation **in all criminal defense cases** (retained and indigent defense) as:

Excellent	7
Good	26
Fair	8
Poor	2

The quality of representation in **indigent defense criminal cases** was rated as:

Excellent	6
Good	24
Fair	10
Poor	5

The quality of representation in **retained criminal cases** was rated as:

Excellent	12
Good	28
Fair	3
Poor	0

Sample Comments — Defense Attorneys

Money crunch may encourage less than thorough work. Except in a few cases, quality is better in appointed [versus retained] cases.

Two chief areas of concern. (1) Sentencing: many attorneys (most) do not anticipate sentencing issues so are not prepared for sentencing issues. Sentencing is a very important area of advocacy, yet many attorneys merely pass through it with no apparent thought for advocacy or even oversight. (2) Search & Seizure: attorneys not up on the ever-changing law.

Pretrial conferences are not set up for real negotiation; some caseloads too high.

The eagerness of the contract firms to plead clients out ASAP and to have little contact with clients is often at shameful levels.

Chief strong point: strong communication between defense attorneys — good working relationships with one another. Chief area of concern: ballot measure 11 is taking up a disproportionate amount of our time/energy and adding stress.

Chief strong point: most defenders know each other and are willing to consult with one another (generally informally). Many *dedicated* defenders. Chief area of concern: caseloads are becoming bigger and bigger and have long since passed “too big” so that public defenders cannot spend the time that the private bar can working up a case.

Most (not all) contracts go to the cheapest lawyers who are really bad and never intend to prepare a defense!

The federal defender, Metro, and many retained lawyers set a high standard that others cannot ignore. Overall things are strong, but there are a few lawyers who are extremely weak in all areas. The SCA should do a better job in identifying lawyers who are not qualified. This is not to say that some artificial qualification standards or mandatory training is the answer. Real benchmarks/standards could work like timely client contact, review of motion practice, trial/plea ratios, number of hours prepping for trial.

Too many cases leads to burnout and apathy which means too many pleas to bad offers.

Chief areas of concern: Overemphasis on prosecution/law enforcement, while under staffing courts, under compensating indigent defense.

In response to the question “[i]s there a difference between the quality of representation for retained and court-appointed clients?” I treat them equally, but I constantly have to justify to the court administrator why I spent a lot of time on a case. This is especially true for my mentally ill clients — which seem to be 70% of court-appointed clients lately.

Chief areas of concern: We have not managed to expose the public to ideas that will spread responsibility for why our justice system operates and fails to operate in the manner it does. Our citizenry is quick to believe

the “problems” are all caused by defendants abusing the Bill of Rights versus police overstepping authority, district attorneys failing to spend time upfront to accurately evaluate [cases], public willing to believe there’s no difference between an arrested methamphetamine manufacturer and an arrested person coerced into acting as a go-between in a bar sale of a paperfold of meth. Public glosses over issue of responsibility.

Chief strong points: The consortium spreads the representation of indigent clients out amongst a fairly broad base of practitioners while still allowing us to act as a cohesive unit when necessary; i.e., sharing motions, understanding system wide problems, etc.

Chief areas of concern: The limited funds available for investigation hampers the defense of many misdemeanor cases. Also the low unit pay rate discourages trial by some attorneys and also causes a lack of post-trial/plea follow up that is often necessary.

III. Responses From Prosecutors

Surveys were mailed to each of the three-hundred thirty-six (336) state prosecutors registered with the Oregon District Attorneys’ Association. Ninety-nine (99) surveys were returned.

Results With Respect To Quality Of Representation

The prosecutor respondents rated the quality of legal representation **in all criminal defense cases** (retained and indigent defense) as:

Excellent	10
Good	72
Fair	15
Poor	0

The quality of representation in **indigent defense criminal cases** was rated as:

Excellent	12
Good	69
Fair	17
Poor	0

The quality of representation in **retained criminal cases** was rated as:

Excellent	14
Good	71
Fair	12
Poor	0

Sample Comments — Prosecutors

Please identify your chief areas of concern about the quality of criminal defense or criminal defense practices in your jurisdiction? (Question #6 and #10)

One of the lawyers who works for the public defender isn't very good. The rest are excellent. The public defender's budget is inadequate to provide excellent representation, but then our budget is inadequate too.

Many lawyers appear to be more concerned with making money than representing the interests of their clients. By avoiding equitable solutions for their clients, the attorneys are getting more severe sanctions imposed on their clients.

I have none regarding the quality as it is excellent.

Ethics; communication with defendants; communication with prosecutors; discovery violations; procrastination.

Criminal defense, especially indigent defense, pays too little to attract quality attorneys. Plus they carry too many clients to do an effective job.

Too many people, not enough time.

My chief area of concern is in juvenile court — whether dependency or delinquency. Also some very marginally competent attorneys are sometimes appointed.

Public defenders are generally good. My worst experiences have been with solo practitioners on the conflict list. There appears to be no prerequisites, such as competency, to being placed on the list.

We have a high failure to appear rate. This causes many problems in the timely resolution of cases and sometimes double appointments. Most of this is not the fault of the defense attorneys, but rather our lack of jail space.

Private bar is gradually losing expertise as most work is handled by [public defenders]. I think this is unhealthy.

Unfortunately, there is not a mechanism in place in the system to get rid of the few bad lawyers that are in the consortium.

Most of the defense bar is very willing to negotiate a reasonable settlement. I worked in

another county for eight (8) years with a public defender's office that I would characterize as system fighters. They would convince clients to take their case to trial, if they could not get the deal they wanted, just to clog the docket and the DA's workload. Their client most often ended up much worse off than under the proposed negotiated offer. In effect, they were selling out the best interest of their client to fight the system.

Borderline unethical tactics in hiding reciprocal discovery. For some it is a disease.

Unnecessary use of indigent defense funds for 'investigative work' and psychological evaluations. Some concern for training of young lawyers in questionable tactics.

Many attorneys haven't met with their clients prior to the day of plea or [probation violation hearing]. Good client contact appears to be lacking in many cases.

Many persons involved are too busy to ever learn their craft. Also zealotry gets in the way of effectiveness. The contract firms are just sending cases down a conveyor belt — no one has any time.

A few defense counsel have good client contact — some keep in good client contact with their clients — the majority do *not*.

Defense attorneys put everything off until the last minute. Frequently seek setovers because they are not prepared. In general, clog the system with cases that should be resolved.

There has been so much turnover in the [public defender's] office that the experienced attorneys are overburdened.

Volume of caseloads adversely affect some defenders in their performance. It appears that some very inexperienced defenders are given serious cases too early in their careers. * * * Our system relies heavily on young, inexperienced lawyers, many of whom do a very good job. They should be supported by the system that puts them to work.

The main problem in our jurisdiction is that many criminal defendants receive appointed attorneys when they are not qualified or marginally qualified and are not required to reimburse the costs.

Postconviction relief issues.

Please identify the chief strong points of criminal defense in your jurisdiction:

They know how system works, know what's realistic and generally do a good job at trial with cases that deserve a trial. They don't waste a large amount of time and resources.

Good group of lawyers. Honest, easy to work with. Can trust them.

Except for one provider, we have a good relationship with defenders and have confidence in their ethics and abilities. Good communications.

Some very zealous and very knowledgeable attorneys — mostly reasonable.

They are ethical and straight forward with a couple of exceptions.

Abundant funding for legal assistants and investigators.

Our defenders are the most experienced both in volume and variety.

Is there a difference between the quality of representation for retained and court-appointed clients?

Without question, despite denials if asked directly, I have observed a general tendency to move quicker and more effectively in retained cases and to allow indigent defendants to receive a less interested service. Example, a lawyer would never allow a [retained client] to have a warrant issued if he failed to appear. The lawyer would request a reset to investigate and to aid his client—to get him there. In indigent cases, these same lawyers would make no effort to save the client from a warrant. The attitude is much less service-oriented. If he fails to show, that's his fault is the attitude.

The experienced [public defenders] are excellent as are the private practitioners who do a lot of criminal work. The problems are the turnover in the [public defender's office] and the attorneys who dabble at criminal work.

I have had attorneys who do minimal work on court-appointed cases and the same attorney with same issues do much more extensive work when retained.

Appointed attorneys are familiar with procedures and do a good job explaining this to their clients. Many retained attorneys are not

familiar with criminal procedure and in the long run do a disservice to their client.

IV. Responses From Probationers

In November 1995 through March 1996, probationers being processed into community corrections offices for Clackamas, Jackson, Curry, Multnomah, Marion and Polk counties were asked to complete a written two-page survey. One-hundred ten (110) probationers responded, seventy-four (74) of whom indicated they were first offenders. Only eighteen (18) probationers reported that they had been incarcerated awaiting resolution of their case.

The manner in which the two-page survey was presented to probationers by intake personnel for completion is unknown. However, after collecting completed surveys, it was discovered that fifteen (15) of the respondents failed to complete the second page of the survey.

Results With Respect To Quality Of Representation

The probationers who completed the survey appear to be relatively satisfied with the manner in which they were represented by their attorneys. However, the survey results reveal that a significant number of the probationers believe their attorneys performed poorly with respect to spending adequate time with them, investigating all defenses and willingness to fight the prosecution.

Probationers were asked to rate their attorneys' performance in a number of areas.

The following areas of performance received the highest number of "excellent" ratings by the probationers:

Pleasant to deal with	38
Willingness to plea bargain	36
Dealt honestly with you	34
Fully explained the defense process . . .	33
Explained matters to your satisfaction . .	32
Knowledge of applicable law	31
Listened to your ideas/concerns	31
Worked hard for you/was prepared . . .	30
Response to your phone calls/letters . .	30

The following areas of attorney performance received the highest number of "poor" ratings:

Willingness to fight the prosecution . . .	31
--	----

Spent adequate time with you	30
Investigated all defenses	24
Kept you informed	22
Response to your phone calls/letters	21
Worked hard for you/was prepared	18
Could be trusted	17
Discussed risks and options	17

Sample Comments — Probationers

I was pleased with my attorney as follows:

Because they did their jobs, what they were supposed to do. Helped in getting charges dropped.

He's hard to get ahold of on the phone — otherwise he was great.

[Name of attorney] did an excellent job. She explained things to me and left it up to me as to what I wanted her to do. I felt really comfortable with her as well as the other staff.

He was very nice and worked to get me what he thought was fair. He was sure I understood everything before I signed anything.

Very polite. Around when I called. Appeared for me every time. Believed in me at the beginning. Backed away toward the end, hurt me and my case.

She was professional at making sure I understood everything that was happening. I was happy that she didn't patronize me or talk down to me.

Prompt, informative, did not beat around the bush.

He was friendly and honest. I just don't think I was enough help. I was young and scared.

He did the best he could do. He made the best of a bad thing.

I was displeased with my attorney as follows:

I had to get him to call DA for plea bargain. I never had a one-on-one appointment with him to discuss my case. He never phoned

me once. I had to call him repeatedly. In two months, I talked to him two times. Once on September 20 at first hearing for approximately 15 minutes. Then once on October 17 or 18th for approximately 15 minutes. Then I showed up at his office on day of court and sat there till he could see me. I knew absolutely nothing about anything except that I was going to jail.

He didn't discuss my case with me ahead of time. He did what he had to do and nothing else.

Was shuffled to four different attorneys in four different offices. Only met with 'my' attorney for approximately 10 minutes. Never really discussed options.

Was a bit late for court. Just made me more nervous. Had to fill out and listen to my plea papers. Explained inside the courtroom during court.

I felt my attorney was not familiar enough with the system, she did not fight for me, and everything she told me was wrong. I feel I would have done much better on my own and would never trust a court-appointed attorney again.

He never showed up for two court days, had to delay, never informed me that he had moved his office.

Left doubts as to who he was working for.

I feel they are too eager to plea bargain instead of fighting for truth and justice. My first offense was a joke. I pled guilty because I didn't quite understand my options and recourse. Felt plea bargain was too easily entered.

He didn't explain the plea bargain. Told me one thing and another happened.

His bill was too much for the time he put in to my case.

He was a dump truck.

Appendix Part Two — Survey Tabulations

I. Judge's Responses

Sixty-seven (67) responses were received from judges. Not every respondent answered every question; some gave more than one answer.

Jurisdiction:

County	38
State	24
1st Judicial Dist	2
Circuit Court	2

Current Position:

Circuit Judge	33
Judge	14
District Judge	18
Trial Judge	1

Years in Position:

Average number of years in position:	9
---	---

Prior legal experience:

Private Practice	55
Public Defender	11
County Counsel	5
Judge's Clerk	7
None	0
Other	40

Primary form of Indigent Defense Delivery Services In Your Jurisdiction:

Public Defender	44
Consortium	32
Law Firm	8
List	11
Other	1
Retained	1

1. In your experience, how would you characterize the quality of defense for indigent accused in your jurisdiction?

Excellent	15
Good	51
Fair	9
Poor	1

2. In your experience, is there a difference in quality of indigent defense between felony and misdemeanor practice?

Yes	27
No	29

3. Indicate your observations of the quality of representation for criminal defendants overall in your jurisdiction:

Excellent	12
Good	54
Fair	6
Poor	0

4. Indicate your observations of the quality of representation of retained criminal defendants in your jurisdiction:

Excellent	21
Good	47
Fair	3
Poor	0

5. Indicate your observations of the quality of representation for indigent defendants in your jurisdiction:

Excellent	17
Good	47
Fair	10
Poor	1

7. Please rate the below listed characteristics of criminal defense attorneys that you perceive as most important in producing quality representation:

Scale: Very Important 5 4 3 2 1 Not Very Important

	5	4	3	2	1
a. Temperament	23	31	12	1	0
b. Knows the law	42	26	1	0	0
c. Aggressive	6	11	32	17	1
d. Organized	43	24	1	0	0
e. Ethical	57	9	1	0	0
f. Communicative	35	26	5	0	0
g. Timely	29	32	6	0	0
h. Reasonable	43	21	2	0	0
i. Trustworthy	59	10	0	0	0

8. Specifically, indicate the quality of the following practice characteristics for criminal defense attorneys who represent the indigent in your jurisdiction:

Defense attorneys are generally prepared for pretrial:

Always	1
Most of the time	43
Sometimes	19
Rarely	2

Defense attorneys are generally prepared for trial:

Always	8
------------------	---

Most of the time	55
Sometimes	4
Rarely	0

Defense attorneys are generally prepared for sentencing issues:

Always	4
Most of the time	55
Sometimes	10
Rarely	1

Defense attorneys work hard at negotiating the case:

Always	6
Most of the time	49
Sometimes	12
Rarely	0

Defense attorneys resolve cases pre-trial (settlement):

Always	0
Most of the time	53
Sometimes	12
Rarely	1

Deputy District Attorneys have realistic expectations about the strengths or weakness of the case:

Always	0
Most of the time	48
Sometimes	19
Rarely	3

Unrealistic expectations about the strengths of their case by Deputy District Attorneys impact the resolution of the case:

Always	0
Most of the time	13
Sometimes	47
Rarely	7

9. Rate your perception of criminal defense representation in the following areas:

	Excellent	Good	Fair	Poor
Precharging investigation	2	18	20	26
Negotiations	8	51	9	0
Motion practice	4	41	21	1
Plea practice	8	52	8	0
Trial practice	10	50	11	1
Sentencing	7	47	11	2
Client contact	3	29	26	6
Post-trial issues	3	28	24	3
Probation violation issues	5	42	19	1
Appeal	1	20	9	0

10. In your experience, is there a difference between the quality of representation for retained and court-appointed clients?

Yes	37
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No	29
--------------	----

II. Defense Attorney's Responses

Forty-two (42) responses were received were received from defense attorneys. Not every respondent answered every question; some gave more than one answer.

What county do you principally practice in?

Clackamas	2
Clatsop	2
Columbia	1
Deschutes	2
Douglas	3
Harney	1
Hood River	1
Jackson	1
Lane	4
Multnomah	17
Tillamook	2
Wasco	1
Washington	5
State Appellate Court	1

Current legal experience (check all that apply):

Private Practice	29
Public Defender	12
Other	8

Prior legal experience (check all that apply):

Private Practice	31
Public Defender	14
District Attorney	9
Other	4
Judge	6
Other	4
County Counsel	2

Primary form of Indigent Defense delivery services you have been involved with:

Public Defender	20
Private Law Firm	18
Court List	18
Consortium	6
Other	3

1. Indicate your observations of the overall quality of representation for criminal defendants in your county:

Excellent	7
Good	26
Fair	8
Poor	2

2. Indicate your observations of the quality of representation for retained criminal defendants in your county:

Excellent	12
Good	28
Fair	3
Poor	0

3. Indicate your observations of the quality of representation for indigent defendants in your county:

Excellent	6
Good	24
Fair	10
Poor	5

4. In your experience, is there a difference in quality or indigent defense between felony and misdemeanor practice?

Yes	15
No	23

5. Please rate the characteristics of criminal defense attorneys that you perceive as most important in producing quality representation:

Scale: Very Important 5 4 3 2 1 Not Very Important

	5	4	3	2	1
a. Temperament	22	15	5	0	0
b. Knows the law	31	7	4	0	0
c. Aggressive	3	20	9	8	2
d. Organized	15	23	3	0	1
e. Ethical	23	13	6	0	0
f. Communicative	19	17	5	0	0
g. Timely	11	24	5	1	1
h. Reasonable	11	21	7	3	0
i. Trustworthy	27	12	2	1	0

6. Specifically, indicate the quality of the following practice characteristics for criminal defense attorneys who represent the indigent in your county:

Defense attorneys are generally prepared for pre-trial:

Always	1
Most of the time	27
Sometimes	11
Rarely	2

Defense attorneys are generally prepared for trial:

Always	8
Most of the time	29
Sometimes	5
Rarely	0

Defense attorneys are generally prepared for sentencing issues:

Always	5
Most of the time	29
Sometimes	6
Rarely	3

Defense attorneys work hard at negotiating the case:

Always	9
Most of the time	27
Sometimes	4
Rarely	1

Defense attorneys resolve cases pre-trial (settlement):

Always	2
Most of the time	33
Sometimes	7
Rarely	1

Deputy District Attorneys have realistic expectations about the strengths or weaknesses of cases:

Always	0
Most of the time	18
Sometimes	19
Rarely	4

Unrealistic expectations about the strengths of their case by Deputy District Attorneys impact the resolution of the case:

Always	7
Most of the time	17
Sometimes	16
Rarely	2

7. Rate your perception of criminal defense representation in the following areas:

	Excellent	Good	Fair	Poor
Precharging investigation	2	13	11	12
Negotiations	8	24	4	1
Motion practice	3	20	13	1
Plea practice	6	22	7	2
Trial practice	9	19	8	0
Sentencing	8	21	6	1
Client contact	3	13	17	4
Post-trial issues	0	7	16	12
Probation violation issues	4	16	12	4
Appeal	1	13	12	4

10. In your experience, is there a difference between the quality of representation for retained and court appointed clients?

Yes	29
No	10

III. Prosecutor's Responses

Ninety-nine (99) responses were received from prosecutors. Not every respondent answered every question; some gave more than one answer.

Jurisdiction:

County 98
State 1

Years in Position:

Average number of years in Position . . . 8

Current Position:

First Assistant 1
Assistant DA 1
District Attorney 15
Senior DDA 12
DDA 68
Prosecutor 2

Prior legal experience:

Private practice 36
Public defender 10
County counsel 4
Judge's clerk 12
None 37
Other 20

Primary form of Indigent Defense delivery services in your jurisdiction:

Public Defender 70
Consortium 29
Law firm 16
List 8
Other 3
Retained 2

1. In your experience, how would you characterize the quality of defense for indigent accused in your jurisdiction?

Excellent 14
Good 65
Fair 20
Poor 0

2. In your experience, is there a difference in quality for indigent defense between felony and misdemeanor practice?

Yes 27
No 56

3. Indicate your observations of the quality of representation for retained criminal defendants in your jurisdiction:

Excellent 14
Good 71

Fair 12
Poor 0

4. Indicate your observations of the quality of representation for criminal defendants overall in your jurisdiction:

Excellent 10
Good 72
Fair 15
Poor 0

5. Indicate your observations of the quality of representation for indigent defendants in your jurisdiction:

Excellent 12
Good 69
Fair 17
Poor 0

7. Please rate the characteristics of criminal defense attorneys that you perceive as most important in producing quality representation:

Scale: Very Important 5 4 3 2 Not Very Important

	5	4	3	2
a. Temperament	32	38	24	4
b. Knows the law	57	39	2	0
c. Aggressive	2	36	41	18
d. Organized	40	41	16	1
e. Ethical	80	12	6	1
f. Communicative	43	45	10	1
g. Timely	34	53	11	1
h. Reasonable	51	41	6	1
i. Trustworthy	80	15	2	1

8. Specifically, indicate the quality of the following practice characteristics for criminal defense attorneys who represent the indigent in your jurisdiction:

Defense attorneys are generally prepared for trial:

Always 3
Most of the time 41
Sometimes 46
Rarely 7

Defense attorneys are generally prepared for trial:

Always 10
Most of the time 76
Sometimes 13
Rarely 0

Defense attorneys are generally prepared for sentencing issues:

Always 6
Most of the time 69
Sometimes 21
Rarely 2

Defense attorneys work hard at negotiating the case:

Always	6
Most of the time	40
Sometimes	49
Rarely	4

Defense attorneys resolve case pre-trial (settlement):

Always	0
Most of the time	50
Sometimes	45
Rarely	3

Defense attorneys have realistic expectations about the strengths of the case:

Always	0
Most of the time	48
Sometimes	48
Rarely	2

9. Rate your perception of criminal defense representation in the following areas:

	Excellent	Good	Fair	Poor
Precharging investigation	1	23	36	24
Negotiations	7	50	38	4
Motion practice	8	38	45	8
Plea practice	8	55	33	2
Trial practice	9	59	29	0
Sentencing	6	60	30	2
Client contact	5	33	43	15
Post-trial issues	2	26	47	8
Probation violation issues	6	36	43	8
Appeal	4	22	29	5

10. In your experience, is there a difference between the quality of representation for retained and court appointed clients?

Yes	58
No	34

IV. Probationer's Responses

One hundred-ten (110) responses were received from probationers. Not every respondent answered every question; some gave more than one answer.

County:

Jackson	39
Clackamas	36
Multnomah	23
Marion/Polk	3
Curry	1

Defense attorney was:

Court-appointed	94
Retained	14

In jail awaiting trial/plea?

Yes	18
No	88

Probation on:

Felony	73
Misdemeanor	33

First or Prior Offender:

First offender	74
Prior offender	33

5. Please rate your attorney's performance:

	Excellent	Good	Fair	Poor
a. Pretrial jail visits	20	17	21	14
b. Response to your phone calls/letters	30	29	21	21
c. Involved you in defense process	26	31	27	12
d. Listened to your ideas/concerns	31	30	29	15
e. Fully explained the defense process	33	28	27	16
f. Investigated all defenses	24	21	29	24
g. Spent adequate time w/you	23	27	24	30
h. Kept you informed	27	34	20	22
i. Discussed risks and options	29	38	21	17
j. Willingness to fight the prosecution	24	21	23	31
k. Could be trusted	28	34	25	17
l. Willingness to plea bargain	36	29	20	4
m. Knowledge of applicable law	31	29	18	5
n. Dealt honestly with you	34	28	18	9
o. Had you prepared for court	27	20	27	15
p. Worked hard for you/was prepared	30	13	28	18
q. Cared about your best interests	26	25	25	14
r. Explained matters to your satisfaction	32	26	24	9
s. Pleasant to deal with	38	27	20	5

Appendix Part Three — Survey Instruments

Oregon State Bar Indigent Defense Task Force Survey Of Judges

Jurisdiction
(County, Federal, etc.)

Current Position

Years in position

Prior Legal Experience: (Check all that apply.)

☐ private practice

☐ county counsel

☐ none

☐ public defender

☐ judge's clerk

☐ other

Primary form of Indigent Defense delivery services in your jurisdiction:

☐ public defender

☐ law firm

☐ other

☐ consortium

☐ list

☐ retained

1. In your experience, how would you characterize the quality of defense for indigent accused in your jurisdiction?

☐ excellent

☐ good

☐ fair

☐ poor

2. In your experience, is there a difference in quality for indigent defense between felony and misdemeanor practice?

☐ Yes, ☐ No Explain: _____

3. Indicate your observations of the quality of representation for criminal defendants overall in your jurisdiction?

☐ excellent

☐ good

☐ fair

☐ poor

4. Indicate your observations of the quality of representation for retained criminal defendants in your jurisdiction?

☐ excellent

☐ good

☐ fair

☐ poor

5. Indicate your observations of the quality of representation for indigent defendants in your jurisdiction?

☐ excellent

☐ good

☐ fair

☐ poor

6. Please identify your chief areas of concern in the quality of criminal defense in your jurisdiction?

7. Please rate the below listed characteristics of criminal defense attorneys that you perceive as most important in producing quality representation:

	Very Important		Neutral		Not very important
a. Temperament	5	4	3	2	1
b. Knows the law	5	4	3	2	1
c. Aggressive	5	4	3	2	1
d. Organized	5	4	3	2	1
e. Ethical	5	4	3	2	1
f. Communicative	5	4	3	2	1
g. Timely	5	4	3	2	1
h. Reasonable	5	4	3	2	1
i. Trustworthy	5	4	3	2	1

8. Specifically, indicate the quality of the following practice characteristics for criminal defense attorneys who represent the indigent in your jurisdiction:

Defense attorney are generally prepared for pretrial:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys are generally prepared for trial:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys are generally prepared for sentencing issues:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys work hard at negotiating the case:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys resolve cases pre-trial (settlement):

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Deputy District Attorneys have realistic expectations about the strengths or weakness of the case:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Unrealistic expectations about the strengths of their case by Deputy District Attorneys impact the resolution of the case:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Please explain: _____

9. Rate your perception of criminal defense representation in the following areas:

	Excellent	Good	Fair	Poor
Pre-charging investigation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Negotiations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Motion practice	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Plea practice	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Trial practice	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sentencing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Client contact	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Post-trial issues	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
P. V. issues	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Appeal	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

10. Please identify the chief strong points of criminal defense in your jurisdiction:

11. Please identify the chief areas of concern for criminal defense practice in your jurisdiction:

12. In your experience, is there a difference between the quality of representation for retained and court appointed clients?

☐ Yes, ☐ No Explain: _____

**Oregon State Bar
Indigent Defense Task Force
Survey Of Defenders**

What county do you principally practice in? _____

Current legal experience (check all that apply):

☐ Private Practice ☐ Public Defender ☐ Other _____

Prior legal experience (check all that apply):

☐ Private Practice ☐ Public Defender ☐ District Attorney
☐ Judge _____ ☐ County Counsel ☐ Other _____

Primary form of Indigent Defense delivery services you have been involved with:

☐ Consortium ☐ Private Law Firm ☐ Court List
☐ Public Defender ☐ None ☐ Other _____

1. Indicate your observations of the overall quality of representation for criminal defendants in your county:

☐ Excellent ☐ Good ☐ Fair ☐ Poor

2. Indicate your observations of the quality of representation for **retained** criminal defendants in your county:

☐ Excellent ☐ Good ☐ Fair ☐ Poor

3. Indicate your observations of the quality of representation for **indigent** defendants in your county:

☐ Excellent ☐ Good ☐ Fair ☐ Poor

4. In your experience, is there a difference in quality for indigent defense between felony and misdemeanor practice?

☐ Yes, ☐ No Explain: _____

5. Please rate the characteristics of criminal defense attorneys that you perceive as most important in producing quality representation:

	Very Important		Neutral	Not Very Important	
a. Temperament	5	4	3	2	1
b. Knows the law	5	4	3	2	1
c. Aggressive	5	4	3	2	1
d. Organized	5	4	3	2	1
e. Ethical	5	4	3	2	1
f. Communicative	5	4	3	2	1
g. Timely	5	4	3	2	1
h. Reasonable	5	4	3	2	1
i. Trustworthy	5	4	3	2	1

6. Specifically, indicate the quality of the following practice characteristics for criminal defense attorneys who represent the indigent in your county:

Defense attorneys are generally prepared for pretrial:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys are generally prepared for trial:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys are generally prepared for sentencing issues:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys work hard at negotiating the case:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys resolve cases pre-trial (settlement):

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Deputy District Attorneys have realistic expectations about the strengths or weakness of cases:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Unrealistic expectations about the strengths of their case by Deputy District Attorneys impact the resolution of the case:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

7. Rate your perception of criminal defense representation in the following areas:

	Excellent	Good	Fair	Poor
Pre-charging investigation	4	3	2	1
Negotiations	4	3	2	1
Motion practice	4	3	2	1
Plea practice	4	3	2	1
Trial practice	4	3	2	1
Sentencing	4	3	2	1

Appendix

Client contact	4	3	2	1
Post-trial issues	4	3	2	1
P. V. issues	4	3	2	1
Appeal	4	3	2	1

8. Please identify the chief strong points of criminal defense in your county:

9. Please identify the chief areas of concern for criminal defense practice in your county:

10. In your experience, is there a difference between the quality of representation for retained and court appointed clients?

☐ Yes, ☐ No Explain: _____

**Oregon State Bar
Indigent Defense Task Force
Survey Of Prosecutors**

_____ Jurisdiction (County, Federal, etc.)	_____ Current Position	_____ Years in position
--	---------------------------	----------------------------

Prior Legal Experience: (Check all that apply.)

- | | | |
|---|---|--------------------------------|
| <input type="checkbox"/> private practice | <input type="checkbox"/> county counsel | <input type="checkbox"/> none |
| <input type="checkbox"/> public defender | <input type="checkbox"/> judge's clerk | <input type="checkbox"/> other |

Primary form of Indigent Defense delivery services in your jurisdiction:

- | | | |
|--|-----------------------------------|-----------------------------------|
| <input type="checkbox"/> public defender | <input type="checkbox"/> law firm | <input type="checkbox"/> other |
| <input type="checkbox"/> consortium | <input type="checkbox"/> list | <input type="checkbox"/> retained |

1. In your experience, how would you characterize the quality of defense for indigent accused in your jurisdiction?

- ☐ Excellent ☐ Good ☐ Fair ☐ Poor

2. In your experience, is there a difference in quality for indigent defense between felony and misdemeanor practice?

- ☐ Yes, ☐ No Explain: _____

3. Indicate your observations of the quality of representation for retained criminal defendants in your jurisdiction?

- ☐ Poor ☐ Fair ☐ Good ☐ Excellent

4. Indicate your observations of the quality of representation for criminal defendants overall in your jurisdiction?

- ☐ Poor ☐ Fair ☐ Good ☐ Excellent

5. Indicate your observations of the quality of representation for indigent defendants in your jurisdiction?

- ☐ Poor ☐ Fair ☐ Good ☐ Excellent

6. Please identify your chief areas of concern in the quality of criminal defense in your jurisdiction?

7. Please rate the below listed characteristics of criminal defense attorneys that you perceive as most important in producing quality representation:

	Very Important		Neutral	Not Very Important	
a. Temperament	5	4	3	2	1
b. Knows the law	5	4	3	2	1
c. Aggressive	5	4	3	2	1
d. Organized	5	4	3	2	1
e. Ethical	5	4	3	2	1
f. Communicative	5	4	3	2	1
g. Timely	5	4	3	2	1
h. Reasonable	5	4	3	2	1
i. Trustworthy	5	4	3	2	1

8. Specifically, indicate the quality of the following practice characteristics for criminal defense attorneys who represent the indigent in your jurisdiction:

Defense attorney are generally prepared for pretrial:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorney are generally prepared for trial:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys are generally prepared for sentencing issues:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys work hard at negotiating the case:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys resolve cases pre-trial (settlement):

☐ always ☐ most of the time ☐ sometimes ☐ rarely

Defense attorneys have realistic expectations about the strengths of the case:

☐ always ☐ most of the time ☐ sometimes ☐ rarely

9. Rate your perception of criminal defense representation in the following areas:

	Excellent	Good	Fair	Poor
Pre-charging investigation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Negotiations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Motion practice	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Plea practice	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Trial practice	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sentencing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Client contact	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Post-trial issues	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
P. V. issues	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Appeal	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

10. Please identify the chief areas of concern for criminal defense practice in your jurisdiction:

11. Please identify the chief strong points of criminal defense in your jurisdiction:

12. In your experience, is there a difference between the quality of representation for retained and court appointed clients?

☐ Yes, ☐ No Explain: _____

**Oregon State Bar
Indigent Defense Task Force
Survey Of Probationers**

Please answer the following questions based upon your own personal experiences in the criminal justice system. There are no right or wrong answers.

1. County _____; Probation: Felony ☐ Misdemeanor ☐

2. I am a first offender ☐; prior offender ☐.

3. My defense attorney was: ☐ court appointed ☐ retained

4. I have been in jail awaiting trial/plea? ☐ yes ☐ no

5. Please rate your attorney's performance: (Circle your response):

	Excellent	Good	Fair	Poor
a. Pre-trial jail visits	1	2	3	4
b. Response to your phone calls/letters	1	2	3	4
c. Involved you in the defense process	1	2	3	4
d. Listened to your ideas/concerns	1	2	3	4
e. Fully explained the defense process	1	2	3	4
f. Investigated all defenses	1	2	3	4
g. Spent adequate time with you	1	2	3	4
h. Kept you informed	1	2	3	4
i. Discussed risks and options	1	2	3	4
j. Willingness to fight the prosecution	1	2	3	4
k. Could be trusted	1	2	3	4
l. Willingness to plea bargain	1	2	3	4
m. Knowledge of applicable law	1	2	3	4
n. Dealt honestly with you	1	2	3	4
o. Had you prepared for court	1	2	3	4
p. Worked hard for you/was prepared	1	2	3	4
q. Cared about your best interests	1	2	3	4
r. Explained matters to your satisfaction	1	2	3	4
s. Pleasant to deal with	1	2	3	4

6. I was pleased with my attorney as follows:

7. I was displeased with my attorney as follows:

Appendix Part Four — Performance Standards For Attorneys: the Inmate Perspective

by M. Kelly

Background

In attempting to establish possible standards of performance for attorneys, it would appear necessary to first identify those areas in which attorneys in general are currently performing or operating unsatisfactorily. One method of ascertaining this is to inquire of those individuals who either utilize, observe, or interact with attorneys on a regular basis. One such group is defendants in criminal cases. The following, then, is the essence of observations, comments and personal experiences offered by inmates at the Federal Prison Camp at Sheridan, OR.

Results

The perspective of the federal prison inmates varies greatly due to the variety in offender backgrounds and characteristics. Despite these differences, the retrospective evaluation of legal representation offered by criminal defendants is remarkably similar. Most individuals identify precisely the same areas of concern or dissatisfaction regarding their trial counsel and generally convey a similar overall assessment of their experiences.

These areas of concern and/or dissatisfaction can be grouped into three basic categories: (1) pretrial; (2) sentencing; and (3) post-conviction phase. The first group deals with that period of time before a jury verdict or guilty plea is entered. The second group pertains to that time from verdict/plea through sentencing. The final group contains those concerns usually arising after sentence has been imposed.

Pretrial Issues:

While the errors or omissions committed by an attorney before trial are the first to occur, they are often the last to be recognized, especially by the defendant/client. This is due to the fact that the defendant is frequently unfamiliar with the judicial system and process, usually by virtue of the fact that he/she is a first time offender. This lack of experience

prevents the defendant/client from identifying mistakes or omissions during pretrial proceedings. Further, the defendant is usually suffering from the "clubbed fish" syndrome. However, once identified, the complaints of one individual to the next are often similar. They include:

- 1) Failure to timely initiate attorney/client visitation;
- 2) Failure to fully debrief the defendant regarding the facts of the crime. This results in an over-reliance on the prosecution's theory of the case;
- 3) Incomplete examination of charging instrument and other relevant documents, i.e., indictment/search warrant;
- 4) Insufficient effort at identifying pretrial issues; i.e., failure to vigorously pursue discovery and investigate or interview victims and witnesses;
- 5) Failure to explore potential defenses;
- 6) Unwillingness to pursue or incorporate defendant's ideas or theories into defense;
- 7) Reluctance to accept defendants' telephone communication;
- 8) Failure to answer correspondence in a timely fashion, if at all; and
- 9) Unwillingness to fight the prosecution — a predisposition to a plea bargain.

The overall conclusion drawn by federal inmates from their pretrial experience is that most attorneys never seriously consider taking a case to trial. While this may be more common in federal cases than state, there definitely exists a predisposition toward plea bargaining. The ramifications of this reluctance to pursue a defense are many, most of which are covered in the above list. Importantly, however, is

that this approach results in a premature resignation of the attorney to a course of action which does not include sufficient effort being made to investigate issues which could lead to the discovery of a potential defense, and in the attorney maintaining a perfunctory attitude toward the client and his insights.

Sentencing Issues:

As defendants are often guilty of at least some portion of the crimes with which they have been charged, most ultimately reach a plea bargain regardless of the attorney's best efforts at finding a defense. Thus, it may be argued, representation and preparation for the sentencing phase of criminal proceedings has become the most important function of the contemporary defense counsel because the outcome of this part of the defense process will affect not just the amount of time a defendant will spend in prison, but how and where he might spend it. This is particularly true at the federal level.

Even more specifically, the Presentence Investigation Report (PSI) has become the centerpiece of the sentencing proceedings. Unfortunately, the litany of complaints by the federal inmates interviewed for this report begs the question: Do attorneys themselves appreciate the full role and impact of the PSI? These complaints included:

- 1) Failure to impress upon the defendant the importance of the PSI;
- 2) Failure to recognize and challenge detrimental information;
- 3) Allowing judges to make nonspecific findings regarding important sentencing matters. This occurs when the court makes a finding regarding only the appropriate quantitative *range* of drugs or financial loss to be used in sentencing rather than the specific amount; and
- 4) Failing to require the court to make a specific finding as to the scope of a conspiracy participant's understanding of the agreement or relevant conduct.

Other issues unrelated to the PSI include:

- 1) Neglecting to ask for downward departure or minimal participant consideration;
- 2) Failing to request the abatement of interest on fines and restitution; and
- 3) Lack of diligence in obtaining clarification of ambiguous statements in the judgment, such as when payments must begin on a fine or restitution.

Also of concern is the same lack of communication between the attorney and the defendant expressed in the discussion of the pretrial issues. Once again, this absence of synergy results in detrimental consequences, primarily in the form of information going unchallenged at sentencing which does not directly relate to the sentence, but may have a large impact on how the Department of Corrections or the Bureau of Prisons administers the sentence. Even a hint of weapons, threatening statements, or the like which were never discussed in court, may provide the basis for prison officials to justify the imposition of one or more "management variables" which could affect the inmate's prison stay. In short, greater attention must be demonstrated to those issues which do not directly affect the actual sentence, but may determine how that sentence is administered.

Post-trial Issues:

As one might suspect, once a defendant enters prison, he often develops a sense of abandonment. The causes of this are numerous and come from many sources, but those originating from the attorney include:

- 1) Failure to discuss or consider issues and ideas for the appeal proffered by the defendant;
- 2) Unwillingness to allow the defendant to review the appeal briefs prior to their filing; and
- 3) A continuing reluctance to take calls or answer letters.

In general, the conclusion that is drawn by many inmates is that attorneys are unwilling to incorporate their clients' ideas or insights into the appeals proc-

ess. This unilateral approach by the attorney naturally results in the client continually initiating contact with the attorney via phone calls and letters, which the attorney naturally finds little need to answer. This, of course, evokes a great deal of frustration and resentment, both of which are unnecessary, and can be avoided with representation which is slightly more sincere in its practice.

Recommendation:

For the most part, the complaints inmates have regarding their attorney's representation do not deal so much with the technical aspects of their performance as it does with their "bedside manner." Failure to initiate regular contact with the client from arrest through appeal, failure to accept calls and answer letters and the unwillingness to allow the defendant to contribute to his defense with ideas and opinions, portray an unprofessional image and create a resentful client.

Therefore, the following improvements are recommended:

- 1) Guidelines depicting acceptable time for response to client letters and phone calls;

- 2) Guidelines recommending that all possible defenses to a defendant's charges be explored prior to entering into plea negotiations; and
- 3) The implementation of standards which define and convey the concept that the attorney is providing a service to the client and the relationship should, therefore, be conducted accordingly.

Conclusion:

Most inmates seem to recognize that attorneys, by and large, are hard working, good natured individuals who perform their responsibilities to the best of their abilities. Unfortunately, many seem to afford little or no attention to details which could prevent the alienation of their criminal defendant clients. With a little additional effort, the perception of attorneys' performance could be greatly improved. In the absence of such, however, standards mandating a level of performance in these areas may be warranted.

Annotations

Performance Standards

Chapter 1

General Standards For Representation In All Criminal, Delinquency, Dependency And Civil Commitment Cases

STANDARD 1.1 — Prerequisites For Representation

Counsel shall only accept an appointment or retainer if counsel is able to provide quality representation and diligent advocacy for the client.

■ Cases and Statutes

The right to assistance of counsel is equally applicable to those who retain counsel and to those to whom counsel is appointed. *Shipman v. Gladden*, 253 Or 192, 199 (1969); *Moore v. United States*, 432 F2d 730 (3rd Cir. 1970)

■ Related Standards and Guidelines

Oregon Code of Professional Responsibility
DR 6-101 Competence and Diligence

Oregon Judicial Department, "Qualification Standards for Court-Appointed Counsel to Represent Indigent Persons at State Expense" (1990)

STANDARD 2.1 Attorneys appointed to represent indigent persons at state expense must provide each client the time and effort necessary to ensure competent and adequate representation. Neither defender organizations nor assigned counsel should accept work loads that, by reason of their excessive size or complexity, interfere with rendering competent and adequate representation or lead to the breach of professional obligations.

STANDARD 3.1 Subject to the provisions of Standard 4.1, the appointing authority shall appoint only those attorneys who:

1. Are members of the Oregon State Bar or are attorneys of the highest court of record in any other state or country who will appear under ORS 9.240; *and*
2. Either:
 - (a) Meet the qualifications specified below for the applicable case type; *or*
 - (b) Possess significant experience and skill equivalent to or exceeding the qualifications specified below, and who demonstrate to the appointing authority's satisfaction that the attorney will provide competent and adequate representation; *and*
3. Have adequate facilities to ensure reasonable and timely personal and telephonic contact between

attorney and client, and between court and attorney, including adequate support staff or answering service/machine for receiving messages and notifying clients of court dates.

National Legal Aid and Defender Association (NLADA), "Performance Guidelines for Criminal Defense Representation" (1994)

NLADA Guideline 1.1 — Role of Defense Counsel

(a) The paramount obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process.

(b) Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court.

ABA Standards for Criminal Justice: Providing Defense Services, Third Edition

(a) Neither defender organizations, assigned counsel nor contractors for service should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases.

(b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgement, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organizations, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

Metropolitan Public Defender

Established a unit valuation system to determine the number of cases each attorney can handle each year. Types of cases are given unit values based on anticipated time demands. Unit values range from 100 to 1. It is assumed that a mythical competent attorney can effectively handle 600 units per year.

State Bar of Michigan, Committee on Assigned Counsel Standards, "Standards for Assigned Counsel" (1995)

1. *Declining Appointment.* Counsel shall decline an appointment from the court to represent an indigent client if the nature or extent of counsel's existing caseload is likely to prevent effective representation of that client.

STANDARD 1.2 — General Duties And Responsibilities Of Counsel To Client; Avoiding Conflict Of Interests

Upon being retained or appointed by the court, counsel should contact the client as soon as practicable AND maintain regular contact thereafter. Counsel should endeavor to establish a relationship of trust and open communication with the client and should diligently advocate the client's position within the bounds of the law and the Rules of Professional Responsibility and the court.

■ Related Standards and Guidelines

Oregon Code of Professional Responsibility

DR 5-107 Settling Similar Claims of Clients

DR 7-101 Representing a Client Zealously

DR 7-102 Representing a Client within the Bounds of the Law

NLADA Guideline 1.3— General Duties of Defense Counsel

(c) Counsel has the obligation to keep the client informed of the progress of the case, where it is possible to do so.

STANDARD 1.3 — Role Of Counsel

Counsel should seek the lawful objectives of the client and should not substitute counsel's judgment for that of the client in those case decisions that are the responsibility of the client.

■ Related Standards and Guidelines

Oregon Code of Professional Responsibility

DR 5-108(A), (B) Avoiding Influences by Others than the Client

Massachusetts Committee for Public Counsel Services, "Performance Guidelines Governing Representation of Indigents in Criminal Cases", 1991

1.3 General Duties of Defense Counsel

- (a) Counsel's primary and most fundamental responsibility is to promote and protect the best interests of the client. This includes honoring the attorney/client privilege, respecting the client at all times, and keeping the client informed of the progress of the case....
- (b) Client should make every effort to arrange for prompt and timely consultation with the client in an appropriate private setting....
- (c) Counsel has an obligation to make available sufficient time, resources, knowledge and experience

to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting appointment.

- (d) Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client....
- (e) Counsel must be alert to, and avoid where appropriate, under the law all potential and actual conflicts of interest that would impair the ability to represent a client.
- (f) The attorney shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are: whether to plead guilty or not guilty and to alter such plea; whether to be tried by a jury or a court; whether to testify at trial; whether to appeal, and whether to waive his/her right to a speedy trial.
- (g) The attorney should explain that final decisions concerning trial strategy, after full consideration with the client and after investigation of the applicable facts and law, are ultimately to be made by the attorney....
- (h) Counsel's obligation to the client continues on all matters until and unless another attorney is assigned and/or files an appearance. Counsel should fully cooperate with successor counsel.
- (i) Counsel should be aware of and protect the client's right to a speedy trial, unless strategic considerations warrant otherwise.
- (j) Unless the prejudice outweighs the benefits, counsel should seek any necessary recess or continuance of any proceeding for which counsel is inadequately prepared....
- (k) Consistent with the obligations and constraints of both court and ethical rules, counsel should make reasonable efforts to seek the most advantageous forum for the client's case, e.g. motions to change venue, etc.
- (l) Where counsel is unable to communicate with client because of either language or mental disability, the attorney shall take whatever steps are necessary to insure that he/she is able to communicate with the client and that the client understands the proceedings. Such steps would include having counsel obtain expert assistance to assist with the matter.
- (m) Counsel should be prompt for all court appearances and appointments and, if a delay is unavoidable, should take necessary steps to inform the client, the court, and minimize the inconvenience to others.

STANDARD 1.4 — Initial Client Interview

Counsel should conduct a client interview as soon as practicable after being retained or appointed by the court, in order to obtain information necessary to pro-

vide quality representation at the early stages of the case and to provide the client with information concerning counsel's representation and the case proceedings.

■ Cases and Statutes

Counsel must obtain information from the client. *DeCoster I*, *supra* at 1203; *United States v. Tucker*, 716 F2d 576, 582, 591, 593 (9th Cir. 1983); *DeCoster II*, *supra* at 280, 281; *State v. Pfeiffer*, 15 Or App 383, 388 (1973); *Cole v. Peyton*, 389 F2d 224, 226 (4th Cir. 1968) (the court further noted that counsels' caseload was so large as to be a factor in their below standard representation in the instant case.). Counsel must fully advise the defendant. *Lyons v. Pearce*, 298 Or 554 (1985); *Barzee v. Cupp*, 29 Or App 705 (1977); *State ex rel Russell v. Jones*, 293 Or 312, 317-318 (1982); *Garrison v. Cupp*, 415 F2d 352 (9th Cir. 1969).

■ Related Standards and Guidelines

NLADA Guideline 2.2 — Initial Interview

(a) Preparation: Prior to conducting the initial interview the attorney, should, where possible:

- (1) be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known;
- (2) obtain copies of any relevant documents which are available, including copies of any charging documents, recommendations and reports made by bail agencies concerning pretrial release, and law enforcement reports that might be available;
- (3) be familiar with the legal criteria of determining pretrial release and the procedures that will be followed in setting those conditions;
- (4) be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as custodian for that client's release;
- (5) be familiar with any procedures for reviewing the trial judge's setting of bail.

(b) The Interview:

- (1) The purpose of the initial interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome.
- (2) Information that should be acquired includes, but is not limited to:
 - (A) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status (if applicable), employment record and history;
 - (B) the client's physical and mental health, educational and armed services records;
 - (C) the client's immediate medical needs;

(D) the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearance or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;

(E) the ability of the client to meet any financial conditions of release;

(F) the names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals;

(3) Information to be provided to the client includes, but is not limited to:

(A) an explanation of the procedures that will be followed in setting the conditions of pretrial release;

(B) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;

(C) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;

(D) the charges and potential penalties;

(E) a general procedural overview of the progression of the case, where possible;

(c) Supplemental Information

(1) Wherever possible, counsel should use the initial interview to gather additional information relevant to preparation of the defense. Such information may include, but is not limited to:

(2) the facts surrounding the charges against the client;

(3) any evidence of improper police investigative practices or prosecutorial conduct which affects the client's rights;

(4) any possible witnesses who should be located;

(5) any evidence that should be preserved;

(6) where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

State Bar of Michigan

7. *Client Interview.* Counsel shall conduct a timely interview of the client after being appointed and sufficiently before any court proceedings so as to be prepared for that proceeding.

Massachusetts Committee for Public Counsel Services, "Performance Guideline Governing Representation of Indigents in Criminal Cases", 1988

2.2 Initial Interview and Preparation for Bail Hearing

(e) Whether or not the client is detained, counsel should describe the court procedures and counsel's obligation regarding the attorney/client privilege. Counsel should explain the client's rights under the Fifth Amendment to the United States Constitution and Article XII of the Massachusetts Declaration of Rights and should specifically advise the client not to discuss the case or any of the facts surrounding it with anyone but counsel unless counsel advises otherwise. This admonition should include the client's speaking out in court and the client's right to request that his/her attorney be present at any interview or questioning.

M. Kelly, Federal Prison Camp, Sheridan, Oregon, "Performance Standards for Attorneys: The Inmate Perspective" (1995) Pretrial Issues

- 1) Failure to time initiate attorney/client visitation.
- 2) Failure to fully debrief the defendant regarding the facts of the crime. This results in an over-reliance on the prosecution's theory of the case.
- 3) Incomplete examination of the charging instrument and other relevant documents. (i.e. Indictment/Search Warrant.)
- 4) Insufficient effort at identifying pretrial issues. (i.e. failure to vigorously pursue discovery, and investigate or interview victims and witnesses.)
- 5) Failure to explore potential defenses.
- 6) Unwillingness to pursue or incorporate defendant's ideas or theories into defense.
- 7) Reluctance to accept defendant/client telephone communication.
- 8) Failure to answer correspondence in a timely fashion, if at all.
- 9) Unwillingness to fight the prosecution; a predisposition to plea bargain.

A. Lopez, Multnomah County Bar Association, Subcommittee on Indigent Defense, "Case Life of Adult Criminal Case" (1991)

I. Preindictment/Arraignment

- A. Explain Miranda and other privileges; attorney/client, parent, husband/wife, etc.
- B. Explain charges/penalties.
- C. Explain rights/procedures, administrative hearings applicable.
- D. Explain civil compromise, expungement (if applicable).
- E. Generate release information (if custodial setting)
- F. Generate witness lists.
- G. Talk to alleged victim or police or DA for potential preindictment or precomplaint resolution.
- H. Assist with setting surrender/arraignment.
 - I. Duty to Preserve evidence.
 - J. Explain criminal process (e.g., Juvenile Court, civil liability, forfeitures, tort claims).
 - K. Internal affairs complaint information.
 - L. Preliminary evaluation: mental competence.

- M. First stage referral, information, attorney referral, appropriate hotline, shelter, etc.

II. FIRST APPEARANCE

- A. Advice of rights, reserve rights, respond to name, formal entry of not guilty plea (if misdemeanor).
- B. Generate release information, make recog pitch, review any relevant information, suggest relevant alternatives, make community contacts.
- C. Determine whether complaint is crime or violation.
- D. Set initial/get contact and overview, explain future court dates, FTA law, duties and responsibilities w/release authorities DMDA, ISP, CSS, BSP, third party conditions.
- E. Emphasize any court warnings, lawyer's role, importance of remaining silent re: facts of case.
- F. Brief investigator — initiate investigation if appropriate.
- G. Get trial assistant involved re: alternatives (e.g. drug or alcohol counseling).
- H. Open/organize file.
 - I. Letter to client, future court dates, significant events.
 - J. Check for conflicts, other pending cases, p.v., parole holds.

III. First Client Interview

- A. Get waiver of appearance.
- B. Release of information.
- C. Develop theory of case.
- D. Generate alternatives.
- E. Get names/addresses of potential witnesses; interview witnesses if time permits.
- F. Identify handicaps, communication difficulties — take steps to assure appropriate conditions or interpreter assigned — ex parte Motion for Interpreter.
- G. If in custody, see immediately — advise, per client's request, parents, spouse, others of custodial situation — if out, schedule appointment.
- H. Make mutual check of defendants.
 - I. Begin negotiations with state, advise D.A of defense witnesses (if any) you want to go before Grand Jury and questions to be asked of them.

STANDARD 1.5 — Theory Of The Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case.

■ Cases and Statutes

Failure to pursue defendant's theory of the case is not ineffective assistance of counsel. *Krummacher v. Gierloff*, 290 Or 867, 627 P2d 458 (1981)

■ **Related Standards and Guidelines**

NLADA Guideline 4.3 — Theory of the Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case.

State Bar of Michigan

24. Developing Trial Strategy. Counsel shall strive to develop a legally correct and factually plausible strategy for trial.

Performance Standards

Chapter 2 Specific Standards For Representation In Criminal And Juvenile Delinquency Cases

STANDARD 2.1 — Prerequisites For Representation

Counsel should be proficient in applicable substantive and procedural law and should have appropriate experience, skill and training for the type of representation required.

■ Cases and Statutes

Some states have recognized these duties as guidelines to serve as a starting point in the development of clearer standards for a determination of effective assistance of counsel. *Strickland v. Washington*, 80 L. Ed. 674, 694 (1984); *DeCoster I*, *supra* at 1203. The standards represent only minimum duties owed by counsel to each client, not aspirational guidelines to which the attorney should strive. *United States v. DeCoster (DeCoster II)*, 624 F2d 196, 276 (1976).

ORS 419C.285 provides that, while only the youth and the state are parties to the adjudication stage of a delinquency proceeding, parents or guardians, the State Office for Services to Children and Families (SOSCF) and the Oregon Youth Authority (OYA) (formerly Children's Services Division [CSD]) if the youth is temporarily committed to the agency, a Court Appointed Special Advocate if one is appointed, and a psychological parent who has intervened in the case under ORS 109.119 (1), are all parties to the dispositional stage of a delinquency proceeding. Parties have the right to notice of the proceeding, the right to appear with counsel and to have counsel appointed if otherwise provided by law. The right to call witnesses and participate in the hearing, as well as the right to appeal. ORS 419C.285 (2). Counsel is constitutionally and statutorily required for parents or guardians facing loss of custody or significant interference with the parent-child relationship. *State ex rel Juw. Dept. v. Grannis*, ORS 419B.205. Further, the juvenile court has authority over parents and guardians of youth within the court's jurisdiction for delinquent acts, and may order them to participate in services for the child or themselves. ORS 419C.573, ORS 419C.575. Parents or guardians subject to such orders and potential contempt penalties for failure to comply, are entitled to court appointed counsel if indigent. ORS 419C.575.

■ Related Standards and Guidelines

NLADA Guideline 1.2 — Education, Training, and Experience of Defense Counsel

(a) To provide quality representation, counsel must be familiar with the substantive criminal law and law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Where appropriate, counsel should also be informed of the practices of the specific judge before whom a case is pending.

(b) Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.

NLADA Guideline 1.3 — General Duties of Defense Counsel

(a) Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.

Washington Defender Association Standards for Public Defense Services

Standard Fourteen - Qualifications of Attorneys

2. Trial attorneys' qualifications according to severity or type of case:
 - e. Juvenile Cases - Class A. Each attorney representing a juvenile accused of a Class A felony shall meet the following requirements:
 - (i) Minimum requirements set forth in Section 1 [re: qualifications to practice law in Washington] , and
 - (ii) Either:
 - a. has served one year as a prosecutor; or
 - b. has served one year as a public defender; or
 - c. has been trial counsel alone of record in five juvenile Class B and C felony trials; and
 - (iii) Each attorney shall be accompanied at his or her first juvenile trial by a supervisor
 - f. Juvenile Cases - Classes B and C. Each attorney representing a juvenile accused of a Class B or C felony shall meet the following requirements:

- (i) Minimum requirements set forth in Section 1; and
- (ii) Either:
 - a. has served one year as a prosecutor; or
 - b. has served on year as a public defender; or
 - c. has been trial counsel alone in five misdemeanor cases brought to a final resolution; and
- (iii) Each attorney shall be accompanied at his or her first juvenile trial by a supervisor.

QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT INDIGENT PERSONS AT STATE EXPENSE, Oregon Judicial Department (1990).

"For juvenile delinquency misdemeanor cases and status offense cases - 3.1 A (1.) Has reviewed and is familiar with the ABA Standards for Criminal Justice (2d ed.), Chapters 4, 5, 10 through 15, and 20 through 22; the Code of Professional Responsibility; the Criminal and Evidence Codes of Oregon, as set forth in ORS Chapters 40, 131-169, 471, and 475; the Uniform Trial Court Rules; and Oregon State Bar, Criminal Law (1986); and (2.) Satisfies one of the following: a.) has been certified under the Oregon Supreme Court Rules on Law Student Appearances to represent clients on behalf of a public defender office, a district attorney office, or a private attorney office in criminal cases; has undertaken such representation for at least six months; and can present a letter from the student's immediate supervisor certifying the student's knowledge of applicable criminal procedure and sentencing alternatives; or, b.) Has observed five complete trials of criminal cases that were tried and submitted to a jury; or c.) Has served as counsel or co-counsel in at least two criminal cases that have been tried and submitted to a jury, or, d.) Has served as co-counsel in at least five criminal cases. Such service shall have included attendance at all court appearances and all client interviews in each case; or, e.) Has served as a judicial clerk for a court that regularly hears criminal cases; or, (3.) In lieu of the above qualifications, possesses significant equivalent experiences under Standard 3.1.2.b. For juvenile delinquency minor felony case and for abuse and neglect and dependency cases - 3.1.3 B 1.) Meets the qualifications in Section A; * and 2.) Has continued to meet the qualifications in Section A for at least nine months; and 3.) Has served as counsel or as co-counsel and has handled a significant portion of the trial in two criminal cases that have been submitted to a jury; and 4.) In at least one felony trial submitted to a jury, has associated on a pro bono or paid basis as co-counsel with an attorney who has previously tried felony cases and is otherwise qualified to try felony cases under these standards; and 5.) On request, can present an additional showing of expertise and competence in the area of criminal trial practice by submitting at least three letters of reference from other criminal trial lawyers or judges the attorney has appeared before on criminal cases. The letters must explain why the attorney has special experience and competence to handle felony

cases involving potential incarceration of up to five years ...

For juvenile delinquency major felony cases, for waiver cases based on major felonies, and for termination of parental rights cases - 3.1.3 C. 1.) Meets the qualifications specified in section B; and 2.) Has continued to meet the qualifications of Section B for nine months and has had nine months of lesser felony trial experience in a public defender or a district attorney office or in private practice; and 3.) On request, can present evidence of additional expertise and competence in the area of criminal trial practice by submitting at least five letters of reference from other criminal trial lawyers or judges that the attorney has appeared before on criminal cases. The letters must explain why the attorney has special experience and competence to handle felony cases involving potential incarceration of 20 years; or 4.) In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.

For juvenile delinquency murder cases -
3.1.3.D. Murder Cases

1. Lead Counsel. An attorney is qualified for appointment as lead counsel in murder cases, not including capital murder if he or she:
 - a. Meets the qualifications in Section C; and
 - b. Has been trying major felony cases for the past three years; and
 - c. Has demonstrated to persons with knowledge of his or her practice a high level of learning, scholarship, training, experience, and ability to provide competent and vigorous representation to defendants charged with a crime for which the most serious penalties can be imposed; including handling cases involving codefendants, a significant number of witnesses, and cases involving suppression issues, psychiatric issues and scientific evidence, and
 - d. Has acted as lead counsel or co-counsel in a significant number of major felonies tried to a jury, which should include at least one homicide case that was tried to a jury and went to a final verdict; and
 - e. On request, can demonstrate the above by:
 - 1) A written statement by the attorney explaining why the attorney believes that he or she has the qualifications required to handle a murder case; and
 - 2) Certification from those with knowledge of the attorney's practice indicating that they believe that the attorney should be allowed to defend murder cases and explaining why the attorney has the qualities required. Certification must include at least five letters from at least two of the following three groups:
 - a) Judges before whom the attorney has appeared;

- b) Defense attorneys who are recognized and respected by the local bar as experienced criminal trial lawyers and who have knowledge of the attorney's practice; and
 - c) District attorneys or deputies against who or with whom the attorney has tried cases; or
 - f. In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.
2. Co-Counsel. Co-Counsel in murder cases must meet the qualification is subparagraphs 1.a, b, c, and e of this section or must possess significant equivalent experience under Standard 3.1.2.b.
- * The Qualification Standards do not specify how much of an attorney's practice must involve criminal or juvenile cases in order to meet the qualifications for a particular level of practice. Attorneys should be engaged in that type of practice at least half-time for a period specified.

■ Commentary:

A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings, p. 4

"Society also needs well-trained and knowledgeable counsel to ensure that expensive institutional resources are reserved for those youth who truly need them, and that young people receive the services they need to avoid future trouble, as well as to provide equal justice in adversarial proceedings."

Ibid., p. 12

"Defender programs that appear to be of high quality have a number of characteristics in common:

- Supportive structural features of the program that make effective representation possible, including limitations on caseloads, the ability to enter the case early on, and the flexibility to represent the client in related collateral matters (such as special education);
- Comprehensive initial and ongoing training, and available resource materials;
- Adequate non-lawyer support and resources;
- Hands-on supervision of attorneys;
- A work environment that values and nurtures juvenile court practice."

STANDARD 2.2 — General Duties And Responsibilities Of Counsel; Avoiding Conflicts Of Interest

In adult criminal and juvenile delinquency matters, counsel or counsel associated in practice should avoid representing two or more clients who have been jointly charged or whose cases have been consolidated.

■ Related Standards and Guidelines

Oregon Code of Professional Responsibility

DR 4-101 Preservation of Confidences and Secrets of a Client

DR 5-105 Conflicts of Interest: Former and Current Clients

NLADA Guideline 1.3 — General Duties of Defense Counsel

(b) Counsel must be alert to all potential and actual conflicts of interest that would impair counsel's ability to represent a client. Where appropriate, counsel may be obliged to seek an advisory opinion on any potential conflicts.

State Bar of Michigan, "Standards for Assigned Counsel," (1995)

3. *Declining Representation - Conflict from Joint Representation.* A lawyer or lawyers associated in practice shall not represent two or more defendants who have been jointly charged or whose cases have been consolidated unless the following conditions are met:

- (a) The attorney proposing to represent two or more defendants states on the record before trial, that joint representation will in all probability not cause a conflict of interest and the reasons for that conclusion;
- (b) The defendants state, on the record, after the court's inquiry and the attorney's statement, that it is their desire to proceed with the same attorney; and
- (c) The court finds, on the record, that a joint representation will in all probability not cause a conflict of interest, and states the reason for the finding. If an unanticipated conflict occurs before or during trial, an attorney who is representing two or more defendants shall immediately inform the court.

4. *Disclosure of other Conflicts.* When counsel identifies an actual or potential conflict of interest arising from circumstances other than the joint representation of co-defendants, counsel shall advise both the client and the court that such a conflict exists. Counsel shall explain the basis of the conflict to the extent possible without divulging privileged communications or jeopardizing the legal right or physical safety of any person. Thereafter, counsel shall withdraw from the case unless the court has elicited from the client, on the record, a knowing and voluntary waiver of the right to proceed with conflict-free counsel.

5. *Preservation of Attorney-Client Privilege.* Counsel shall preserve the attorney-client privilege and not disclose, without the client's permission, statements made in confidence.

6. *Acceptance of Fees.* Counsel shall not seek or accept fees from an indigent client or from any other source on the client's behalf other than fees authorized by the appointing authority.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

3.2 Adversity of interests.

- (a) Adversity of interests defined. For purposes of these standards, adversity of interests exists when a lawyer or lawyers associated in practice:
 - (i) Formally represent more than one client in a proceeding and have a duty to contend in behalf of one client that which their duty to another requires them to oppose.
 - (ii) Formally represent one client but are required by some third person or institution, including their employer, to accommodate their representation of that client to factors unrelated to the client's legitimate interests.
- (b) Resolution of adversity. At the earliest feasible opportunity, counsel should disclose to the client any interest in or connection with the case or any other matter that might be relevant to the client's selection of a lawyer. Counsel should at the same time seek to determine whether adversity of interests potentially exists and, if so, should immediately seek to withdraw from representation of the client who will be least prejudiced by such withdrawal.

STANDARD 2.3 — Role Of Counsel

Counsel should seek the lawful objectives of the client and should not substitute counsel's judgment for that of the client in those case decisions that are the responsibility of the client.

■ Cases and Statutes

Counsel is constitutionally and statutorily required for youth in delinquency cases. *In re Gault*, 387 US 1 (1967.)

ORS 419C.200 et seq. Counsel must be appointed for youth whenever requested in cases where the youth would be entitled to court-appointed counsel if the youth were an adult charged with the same offense. ORS 419C.200 (1). The parent or guardian of the youth's estate may be required to pay for costs of court-appointed counsel if they do not meet the standards for indigency applied in adult criminal cases. ORS 419C.203; ORS 135.050. Payment of court-appointed counsel is governed by the same statutes governing such payments in adult criminal cases. ORS 419C.206; ORS 419C.209; ORS 135.050 - .055; ORS 151.430 - .480; and ORS 151.460.

■ Related Standards and Guidelines

Oregon Code of Professional Responsibility

DR 5-108(A), (B) Avoiding Influence by Others than the Client

Massachusetts Committee for Public Counsel Services (1991)

1.3 General Duties of Defense Counsel

- (a) Counsel's primary and most fundamental responsibility is to promote and protect the best interests of the client. This includes honoring the attorney/client privilege, respecting the client at all times, and

keeping the client informed of the progress of the case....

- (b) Client should make every effort to arrange for prompt and timely consultation with the client in an appropriate private setting....
- (c) Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting appointment.
- (d) Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client....
- (e) Counsel must be alert to, and avoid where appropriate, under the law all potential and actual conflicts of interest that would impair the ability to represent a client.
- (f) The attorney shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are: whether to plead guilty or not guilty and to alter such plea; whether to be tried by a jury or a court; whether to testify at trial; whether to appeal, and whether to waive his/her right to a speedy trial.
- (g) The attorney should explain that final decisions concerning trial strategy, after full consideration with the client and after investigation of the applicable facts and law, are ultimately to be made by the attorney....
- (h) Counsel's obligation to the client continues on all matters until and unless another attorney is assigned and/or files an appearance. Counsel should fully cooperate with successor counsel.
- (i) Counsel should be aware of and protect the client's right to a speedy trial, unless strategic considerations warrant otherwise.
- (j) Unless the prejudice outweighs the benefits, counsel should seek any necessary recess or continuance of any proceeding for which counsel is inadequately prepared....
- (k) Consistent with the obligations and constraints of both court and ethical rules, counsel should make reasonable efforts to seek the most advantageous forum for the client's case, e.g. motions to change venue, etc.
- (l) Where counsel is unable to communicate with client because of either language or mental disability, the attorney shall take whatever steps are necessary to insure that he/she is able to communicate with the client and that the client understands the proceedings. Such steps would include having counsel obtain expert assistance to assist with the matter.
- (m) Counsel should be prompt for all court appearances and appointments and, if a delay is unavoidable, should take necessary steps to inform the

client, the court, and minimize the inconvenience to others.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

3.1 The nature of the relationship

- (a) Client's interest's paramount. However engaged, the lawyer's principal duty is the representation of the client's legitimate interests. Considerations of personal and professional advantage or convenience should not influence counsel's advice or performance.
- (b) Determination of client's interests.
 - (i) Generally. In general, determination of the client's interests in the proceedings, and hence the plea to be entered is ultimately the responsibility of the client after full consultation with the attorney.
 - (ii) Counsel for the juvenile.
 - [a] Counsel for the respondent in a delinquency or in need of supervision proceeding should ordinarily be bound by the client's definition of his or her interests with respect to admission or denial of the facts or conditions alleged. It is appropriate and desirable for counsel to advise the client concerning the probable success and consequences of adopting any posture with respect to those proceedings. . .
 - [c] In delinquency and in need of supervision proceedings where it is locally permissible to so adjudicate very young persons, and in child protective proceedings, the respondent may be incapable of considered judgment in his or her own behalf.

STANDARD 2.4 — Obligations Of Counsel Regarding Pretrial Release

When a client is in custody, counsel should explore with the client the pretrial release of the client under the conditions most favorable to the client and attempt to secure that release.

■ **Related Standards and Guidelines**

NLADA Guideline 2.1 — General Obligations of Counsel Regarding Pretrial Release

The attorney has an obligation to attempt to secure the pretrial release of the client under the conditions most favorable and acceptable to the client.

NLADA Guideline 2.3 — Pretrial Release Proceedings

- (a) Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release.

- (b) Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.

- (c) If the court set conditions of release which require the posting of a monetary bond or the posting of real property as collateral for release, counsel should make sure the client understands the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should advise the client and others acting in his or her behalf how to properly post such assets.

- (d) Where the client is incarcerated and unable to obtain pretrial release, counsel should alert the court to any special medical or psychiatric and security needs of the client and request that the court direct the appropriate officials to take steps to meet such special needs.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

8. *Securing Client's Release.* Counsel shall take reasonable steps to secure the client's release from custody under the least restrictive conditions possible.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

6.4 Detention.

- (a) If the client is detained. . . the lawyer should immediately consider all steps that may in good faith be taken to secure the child's release from custody.
- (c) The lawyer should not personally guarantee the attendance or behavior of the client or any other person, whether as surety on a bail bond or otherwise.

New York State Bar Association: Law Guardian Representation Standards

Standard B-3

If detention has been requested, a strong argument for release should be advanced, including the introduction of any facts ascertained through interviewing of the child or others. Alternatives to detention, or, at least, secure detention, should be argued. If the child is nevertheless placed in detention, a probable cause hearing should be requested.

Standard C-3

Evidence, if any, which militates against continued detention should be gathered, including school records, affidavits, and witnesses who could testify concerning the lack of probable cause or present alternatives to detention.

■ **Commentary:**

A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings, p. 32

"Effective representation and advocacy at the earliest stage of the proceedings may have a significant influence on the ultimate disposition of the case. Juveniles who are securely detained prior to adjudication—rather than released to parents or placed in community-based programs—are much more likely to be incarcerated at disposition than youth who have not been detained, regardless of the charges against them. Thus, it is vital that defenders explore alternatives to secure detention as early as possible.

STANDARD 2.5 — Initial Court Appearances

Counsel should preserve all of the client's constitutional and statutory rights at initial court appearances.

■ **Related Standards and Guidelines**

NLADA Guideline 3.1 — Presentment and Arraignment

The attorney should preserve the client's rights at the initial appearance on the charges by:

- (1) entering a plea of not guilty in all but the most extraordinary circumstance where a sound tactical reason exists for not doing so;
- (2) requesting a trial by jury, if failure to do so may result in the client being precluded from later obtaining a trial by jury;
- (3) seeking a determination of whether there is probable cause to support the charges alleged and, if there is not probable cause, or other grounds exist for dismissal, requesting that the court dismiss the charge or charges;
- (4) requesting a timely preliminary hearing if it is provided for under the rules of the court unless there is a sound tactical reason not to do so.

NLADA Guideline 3.2 Preliminary Hearing

- (a) Where client is entitled to a preliminary hearing, the attorney should take steps to see that the hearing is conducted timely unless there are strategic reasons for not doing so.
- (b) In preparing for the preliminary hearing, the attorney should become familiar with:
 - (1) the elements of each of the offenses alleged;
 - (2) the law of the jurisdiction for establishing probable cause;
 - (3) factual information which is available concerning probable cause.

NLADA Guideline 3.3 — Prosecution Requests for Non-Testimonial Evidence

The attorney should be familiar with the law governing the prosecution's power to require a defendant to provide non-testimonial evidence (such as handwriting exemplars

and physical specimens), the circumstances in which the defendant may refuse to do so, the extent to which counsel may participate in the proceedings, and the record of the proceedings required to be maintained.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

9. Filing Appearance; Arraignment on Complaint or Preliminary Hearing on Petition. Counsel shall promptly file an appearance and shall be present at the arraignment on the complaint or preliminary hearing on petition, unless counsel is not appointed until after that proceeding has occurred, or unless counsel and the client have made other satisfactory arrangements.

10. Preliminary Review and Discovery. Counsel shall conduct a preliminary review of the available evidence and applicable law; and, in felony and delinquency cases, this review should be before the preliminary examination or probable cause hearing.

11. Conducting Preliminary Examinations or Probate [sic] Cause Hearings. In a felony or delinquency case, counsel should evaluate the client's best interest in deciding whether to hold or waive the preliminary examination or probable cause hearing and discuss with the client the considerations relevant to that decision.

12. Appearance at Arraignment on Information. In a felony case, counsel shall appear at the arraignment on the information unless a written waiver of arraignment has been filed in conformity with the applicable court rule.

13. Insuring Propriety of Evidentiary Procedures. Counsel shall take reasonable steps to ensure that police or prosecution procedures for obtaining non-testimonial evidence are properly conducted.

Case Life of Adult Criminal Case

V. FURTHER PROCEEDINGS

Check Grand Jury results.

- A. Set for arraignment.
- B. Generate more release options, follow up with release conditions as needed.
- C. Advise client of Grand Jury result, arraignment date and time.
- D. Set call back schedule with trial assistant if no complainant (misdemeanor) or cannot proceed (felony).

VI. ARRAIGNMENT

- A. Advise court as to why client is not there (stay bench warrant).
- B. Representation at arraignment.
 1. Not guilty.
 2. Preserve rights.
 3. Advise court if mental defense.
 4. Release on recog if appropriate.
 5. Request further proceedings dates and times.

Massachusetts Committee for Public Counsel Services (1988)

3.2 Probable Cause Hearing,

- (e) Counsel should be certain that the proceedings are being adequately recorded. Counsel should be prepared to challenge the prosecution's showing of probable cause on each element and on aggravating elements. Counsel should take maximum discovery advantage of the hearing, such as by filing appropriate motions and using compulsory process and sequestration. Counsel should not present affirmative proof, especially the client's testimony, unless there is a sound tactical reason for doing so which overcomes the inadvisability of disclosing the defense case at this stage.
- (f) Where appropriate, counsel should consider pursuing the alternative of a court retaining jurisdiction over a lesser-included offense.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

7.3 (b) Other motions. Where the circumstances warrant, counsel should promptly make any motions material to the protection and vindication of the client's rights, such as motions to dismiss the petition, to suppress evidence, for mental examination, or appointment of an investigator or expert witness, for severance, or to disqualify a judge. Such motions should ordinarily be made in writing when that would be required for similar motions in civil or criminal proceedings in the jurisdiction. If a hearing on the motion is required, it should be scheduled at some time prior to the adjudication hearing if there is any likelihood that consolidation will work to the client's disadvantage.

New York State Bar Association: Law Guardian Representation Standards

Standard B-1. The petition and supporting papers should be examined carefully. If any defects are found, appropriate preliminary motions should be filed, such as a motion to dismiss.

■ **Commentary:**

A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings, p. 32

"Attorneys' work during the pretrial period of juvenile cases is critical to obtaining favorable outcomes for their clients. It is during this time that attorneys must investigate the facts, obtain discovery from prosecutors, acquire additional information about their clients' personal histories, file motions on behalf of their clients, and advocate for clients at probable cause hearings and other pretrial hearings. This stage of the case sets the foundation for strategies at adjudication hearings, negotiations with prosecutors, and development of appropriate dispositions."

STANDARD 2.6 — Independent Investigation

Counsel should promptly conduct an independent review and investigation of the case, including obtaining infor-

mation, research and discovery necessary to prepare the case for trial or hearing.

■ **Cases and Statutes**

Counsel must conduct an adequate investigation of the facts. *United States v. Cronin*, 80 L Ed2d 657, 671 (1984); *State v. Smith*, 140 Ariz 355, 681 P2d 1374 (1984); *Krummacker, supra* at 875; *DeCoster I, supra* at 1203; *Ewing v. Williams, supra* at 396 n. 5; *United States v. Williams*, 631 F2d 198, 211, 212 (9th Cir 1980); *Tucker, supra* at 593; *United States v. Porterfield*, 624 F2d 122, 1230124 (10th Cir. 1980); *State v. Vargas*, 74 Or App 588, 596 (1985); *Proffitt v. United States*, 582 F2d 854, 858-859 (4th Cir. 1978); *United States v. Baynes*, 622 F2d 66, 69 (3rd Cir. 1980); *Hines v. Enomoto*, 658 F2d 667 (9th Cir. 1981); *DeHart v. State*, 55 Or App 254, 258, 265 (1981). Defense counsel is obligated to perform all necessary legal investigation, researching all relevant issues of law. *People v. Ibarra*, 34 Cal. Rptr. 863, 386 P2d 487, 490 (1963); *In Re Williams*, 81 Cal. Rptr. 784, 460 P2d 984 (1969); *Krummacker v. Gierloff*, 290 Or 867, 875; *DeCoster II, supra* at 278.

■ **Related Standards and Guidelines**

Oregon Code of Professional Responsibility

DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer

NLADA Guideline 4.1 — Investigation

- (a) Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts concerning guilt. The investigation should be conducted as promptly as possible.
- (b) Sources of investigative information may include the following:
 - (1) Charging Documents

Copies of all charging documents in the case should be obtained and examined to determine the specific charges that have been brought against the accused. The relevant statutes and precedents should be examined to identify:

 - (A) the elements of the offense(s) with which the accused is charged;
 - (B) the defenses, ordinary and affirmative, that may be available;
 - (C) any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.
 - (2) The accused

If not previously conducted, an in-depth interview of the client should be conducted as soon as possible and appropriate after appointment or retention of counsel. The interview with the client should be used to:

 - (A) seek information concerning the incident or events giving rise to the charge(s) or improper police investigative practices or

- prosecutorial conduct which affects the client's rights;
- (B) explore the existence of other potential sources of information relating to the offense;
- (C) collect information relevant to sentencing
- (3) Potential witnesses
Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the accused. If the attorney conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.
- (4) The police and prosecution
Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.
- (5) Physical evidence
Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant or sentencing.
- (6) The scene
Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstance as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).
- (7) Expert assistance
Counsel should secure the assistance of experts where it is necessary or appropriate to:
 - (A) the preparation of the defense;
 - (B) adequate understanding of the prosecution's case;
 - (C) rebut the prosecution's case.

NLADA Guideline 4.2 — Formal and Informal Discovery

- (a) Counsel has a duty to pursue as soon as practicable discovery procedures provided by the rules of the jurisdiction and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case. In considering discovery requests, counsel should take into account that such requests may trigger reciprocal discovery obligations.
- (b) Counsel should consider seeking discovery of the following items:
 - (1) potential exculpatory information;

- (2) the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
- (3) all oral and/or written statements by the accused, and the details of the circumstances under which the statements were made;
- (4) the prior criminal record of the accused and any evidence of other misconduct that the government may intend to use against the accused;
- (5) all books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;
- (6) all results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;
- (7) statements of co-defendants.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

14. Discovery. Counsel shall pursue discovery of the prosecution case, by informal methods if available, and by formal methods if necessary. In felony cases, counsel shall comply with the applicable rules for reciprocal discovery.

15. Defense Investigation. Counsel shall conduct a timely investigation of the prosecution case and potentially viable defense theories.

16. Keeping the Client Informed. Counsel shall keep the client apprised of the progress of the case and shall timely inform the client of pleadings filed in the client's behalf and orders and opinions issued by the court in the case.

17. In-depth Interview. Counsel shall conduct an in-depth client interview before trial or plea.

18. Obtaining Expert and Investigative Assistance. Counsel shall seek to obtain expert assistance, including investigation needed to meet the prosecution case or prepare a defense.

19. Reviewing Applicable Law. Counsel shall be familiar with the law applicable to the offense(s) charged, lesser included offenses, potential defense, and the admissibility of potential prosecution and defense evidence.

20. Obtaining Transcripts of Prior Proceedings. Where necessary for preparation of the defense, counsel shall obtain and read transcripts of prior proceedings in the case or in related proceedings.

Massachusetts Committee for Public Counsel Services (1988)

IV Pretrial Preparation, 4.4

Among the discovery material counsel should consider seeking, through motions if necessary, are the following items under the control of all pertinent law enforcement agencies:

- (a) details of all identification procedures, including examination of any photographs shown and selected;
- (b) written and oral statements of defendant/co-defendant(s);

- (c) copies of statements by potential witnesses;
- (d) copies of all official reports, e.g. police, arson, hospital, results of any scientific test;
- (e) inspection of physical evidence;
- (f) list of potential witnesses and addresses;
- (g) names and addresses of any witnesses expected to offer expert opinions and the substance of their anticipated testimony;
- (h) probation records of all potential witnesses;
- (i) copies of Grand Jury minutes;
- (j) exculpatory evidence, including promises, rewards, inducements made to witnesses;
- (k) any other item helpful to prepare and try the case (e.g. 911 tapes and videotapes).

Case Life of Adult Criminal Case

VII. POST ARRAIGNMENT

- A. Demand discovery.
- B. Obtain and review police reports.
- C. Review evidence alone and with client — evaluate evidence with client.
 - 1. Make a witness list.
 - 2. Identify motions or challenges.
 - a. Theory of case.
 - b. Potential defenses.
 - 3. Point out strengths and weaknesses of case to client including probable outcome and consequences.
- D. Review alternatives.
 - 1. Civil compromise.
 - 2. Diversion.
 - 3. Plea.
 - 4. Jury/court trial.
- E. Explain court procedures including next court date, time and place.
- F. Explain and emphasize attorney/client privilege, obtain any waivers, releases, or agreements necessary for effective representation.
- G. Review social, community alternatives.
- H. Re-emphasize FTA law, importance of following court and pretrial release responsibilities.
 - I. Make sure client has attorney's and trial assistant's business cards.
 - J. Escort client out of building.
- K. During interview — clear calendar for client, have appointment when support staff is available.
- L. Prepare and present ex parte appointments of experts, investigator, medical reports, aid and assist, transport orders.
- M. File notice of defenses as mandated by law, reciprocal discovery.
- N. Investigation.
- O. Research, draft motions, continue working on alternatives.
- P. If in custody be prepared for daily inquiries from client re: case status and progress made.

- Q. Handle calls from concerned agencies, family, friends, other lawyers.
- R. Generate meeting with co-defendant's lawyers, obtain permission from co-defendant's lawyers to talk with co-defendant or witnesses.
- S. Schedule time to meet with D.A. and complainant if necessary.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

7.3 Discovery and motion practice.

(a) Discovery.

- (i) Counsel should promptly seek disclosure of any documents, exhibits or other information potentially material to representation of clients in juvenile court proceedings. If such disclosure is not readily available through informal processes, counsel should diligently pursue formal methods of discovery including, where appropriate, the filing of motions for bills of particulars, for discovery and inspection of exhibits, documents and photographs, for production of statements by and evidence favorable to the respondent, for production of a list of witnesses, and for the taking of depositions.
- (ii) In seeking discovery, the lawyer may find that rules specifically applicable juvenile court proceedings do not exist in a particular jurisdiction or that they improperly or unconstitutionally limit disclosure. In order to make possible adequate representation of the client, counsel should in such cases investigate the appropriateness and feasibility of employing discovery techniques available in criminal or civil proceedings in the jurisdiction.

New York State Bar Association: Law Guardian Representation Standards

Standard A-1

The law guardian should interview the child to ascertain the detailed facts concerning the crime charged and the facts surrounding the child's arrest and questioning (if the law guardian is not assigned until the initial appearance, the law guardian should request a brief adjournment to carry out these functions).

Standard A-2

At the initial interview the law guardian should carefully ascertain the child's involvement, if any, in the alleged crime; the child's possible involvement should be examined on a confidential basis without the presence of the parents.

Standard C-1

The law guardian should attempt to interview major witnesses, such as complainant or victim who may testify at the probable cause hearing and obtain copies of any statements such witnesses may have made, as well as copies of relevant police reports.

Standard D-1

If a full fact-finding hearing is a possibility, the law guardian should conduct interviews with the respondent and witnesses, both defense and prosecution. If helpful, the scene of the occurrence should be visited.

Standard D-3

If necessary because the case is unusually complicated or for other valid reasons, an investigator or experts, such as mental health specialists, should be retained.

Standard D-4

If there is any reasonable probability of a full hearing, the scope of testimony and possible cross-examination should be carefully prepared with the child and major defense witnesses.

■ **Commentary:**

A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings, p. 30

"It is also vital that defenders take time to keep clients informed before and after court appearances and other significant events. Going through the system can be a confusing and frightening process. Young people often have incorrect notions of what might happen to them. Clients should be told exactly how to get in touch with counsel and when their attorney will next be in contact. Clients should be advised of what to do if rearrested and what their responsibilities are between court appearances.

STANDARD 2.7 — Pretrial Motions; Hearings Regarding Ability To Aid And Assist And Waiver Of Juvenile Court Jurisdiction

Counsel should research, prepare, file and argue appropriate pretrial motions whenever there is reason to believe the client is entitled to relief. Counsel should be prepared to provide quality representation and advocacy for the client at any hearings regarding the client's ability to aid and assist and waiver of juvenile court jurisdiction.

■ **Cases and Statutes**

In the initial stages of appointment, defense counsel must be prepared to take all procedural steps necessary to protect the defendant's legal rights. *ABA Standards*, sec. 4-3.6. Motions for psychiatric evaluations must be made whenever there is a reasonable possibility of success, as well as motions to suppress illegally obtained evidence, for change of venue, continuance, severance or dismissal. *Arrowood v. Clusen*, 732 F2d 1364 (7th Cir. 1984); *King v. Cupp*, 68 Or App 460 (1984); *Moran v. Morris*, 478 F. Supp. 145 (C.D. Cal. 1979); *United States v. Easter*, 539 F2d 663 (8th Cir. 1976); *Cooper v. Fitzharris*, 586 F2d 1325 (9th Cir. 1978).

■ **Related Standards and Guidelines**

NLADA Guideline 5.1 — The Decision to File Pretrial Motions

- (a) Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the applicable law may entitle the defendant to relief which the court has discretion to grant.
- (b) The decision to file pretrial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of each case. Among the issues that counsel should consider addressing in a pretrial motion are:
 - (1) the pretrial custody of the accused;
 - (2) the constitutionality of the implicated statute or statutes;
 - (3) the potential defects in the charging process;
 - (4) the sufficiency of the charging document;
 - (5) the propriety and prejudice of any joinder of charges or defendants in the charging document;
 - (6) the discovery obligations of the prosecution and the reciprocal discovery obligations of the defense;
 - (7) the suppression of evidence gathered as a result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, or corresponding or additional state constitutional provisions, including:
 - (A) the fruits of illegal searches or seizures;
 - (B) involuntary statements or confessions;
 - (C) statements or confessions obtained in violation of the accused's right to counsel, or privilege against self-incrimination;
 - (D) unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification.
 - (8) suppression of evidence gathered in violation of the accused's right to counsel, or privilege arising out of state or local law;
 - (9) access to resources or experts which may be denied to an accused because of his or her indigence;
 - (10) the defendant's right to a speed trial;
 - (11) the defendant's right to a continuation in order to adequately prepare his or her case;
 - (12) matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;
 - (13) matters of trial or courtroom procedure.
- (c) Counsel should withdraw or decide not to file a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the defendant's rights against later claims of waiver or procedural default. In making this decision, counsel should remember

that a motion may have many objectives in addition to the ultimate relief requested by the motion. Counsel thus should consider whether:

- (1) the time deadline for filing pretrial motions warrants filing a motion to preserve the client's rights, pending the results of further investigation;
- (2) changes in the governing law might occur after the filing deadline which could enhance the likelihood that relief ought to be granted;
- (3) later changes in the strategic and tactical posture of the defense may occur which affect the significance of potential pretrial motions.

NLADA Guideline 5.2 — Filing and Arguing Pretrial Motions

- (a) Motions should be filed in a timely manner, should comport with the formal requirements of the court rules and should succinctly inform the court of the authority relied upon. In filing a pretrial motion, counsel should be aware of the effect it might have upon the defendant's speedy trial rights.
- (b) When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:
 - (1) investigation, discovery and research relevant to the claim advanced;
 - (2) the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses;
 - (3) full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and costs of having the client testify.

NLADA Guideline 5.3 — Subsequent Filing of Pretrial Motions

Counsel should be prepared to raise during the subsequent proceedings any issue which is appropriately raised pretrial, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Further, counsel should be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

21. Consideration of Pretrial Motions. Whenever there exists a good faith reason to believe that the applicable law may entitle the client to relief which is within the court's discretion to grant, counsel should consider filing an appropriate motion.

22. Consulting Client on Pretrial Motions. While the ultimate power to decide whether to file a motion or to refrain from filing a motion is vested in counsel, counsel should consult with the client concerning these alternative courses of action.

23. Filing Pretrial Motions. The motions counsel should consider filing include:

- (a) pretrial motions reasonably available on the facts which might lead to reduction or dismissal of the charge(s);
- (b) motions to suppress illegally obtained evidence;
- (c) motions to exclude arguably inadmissible substantive or impeachment evidence which is damaging to the defense unless there is strategic benefit to the client in having evidence admitted;
- (d) procedural motions required by the facts of the case to ensure the fairness of the proceedings and to preserve claims for appellate review.

25. Filing Notice of Affirmative Defense. Counsel shall file timely notices of affirmative defenses if required by law.

New York State Bar Association: Law Guardian Representation Standards

Standard D-2

Every possible defense, including mental disease or defect or lack of intent, should be considered.

Standard D-5

The full range of discovery permitted under the Family Court Act should be considered and appropriate requests or motions filed.

Standard D-6

The full range of appropriate pre-trial motions (e.g. discovery, suppression, inspection, *Wade, Huntley*) should be carefully considered and, when relevant, filed on a timely basis. Similarly, appropriate pre-trial hearings should be requested.

Standard D-9

The strength and weaknesses of the prosecution case should be fully evaluated from the point of view of both fact-finding and disposition. The defense strategy should be developed with full consultation, in terms the child can understand, with the child and his parent. The law guardian's position, goals and strategies should be agreed to by the child.

Standard D-11

The law guardian should insure that the time requirements for motions and convening a fact-finding hearing are complied with.

STANDARD 2.8 — Pretrial Negotiations And Admission Agreements

Counsel should:

1. with the consent of the client explore diversion and other informal and formal admission or disposition agreements with regard to the allegations;
2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
3. keep the client fully informed of the progress of the negotiations;
4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;
5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and
6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.

■ Cases and Statutes

Failure to advise defendant of the possibility of a minimum sentence prior to guilty plea is basis for post conviction relief if defendant did not know of minimum and it would have made a difference in his decision to plead guilty. *Moen v. Peterson*, 312 Or 503, 824 P2d 404 (1991); *Hartzog v. Keeney*, 304 Or 57, 724 P2d 600 (1987); Failure to advise defendant of dangerous offender statute unless defendant knew of statute anyway, *Meyers v. Maass*, 106 Or App 32, 806 P2d 521 (1991). Failure to submit tentative plea agreement to judge for purpose of getting judge to concur and follow procedure set forth by ORS 135.432(2). Failure to advise defendant that plea agreement was not binding on judge. *Trujillo v. Maass*, 312 Or 431, 822 P2d 703 (1991). Incorrectly advising defendant that his record could be expunged where defendant conditioned his plea of guilty on being able to expunge his record. *Long v. State of Oregon*, 130 Or App 198, 880 P2d 509 (1984).

■ Related Standards and Guidelines

Oregon Code of Professional Responsibility

DR 5-107 Settling Similar Claims of Clients

NLADA Guideline 6.1 — The Plea Negotiation Process and the Duties of Counsel

- (a) Counsel should explore with the client the possibility and desirability of researching a negotiated disposition of the charges rather than proceeding to a trial and in doing so should fully explain the rights that would be waived by a decision to enter a plea and not proceed to trial.
- (b) Counsel ordinarily obtain the consent of the client before entering into any plea negotiation.
- (c) Counsel should keep the client fully informed of any continued plea discussion and negotiations and convey to the accused any offers made by the prosecution for a negotiated settlement.
- (d) Counsel should not accept any plea agreement without the client's express authorization.
- (e) The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense.

NLADA Guideline 6.2 — The Contents of the Negotiation

- (a) In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of :
 - (1) the maximum term of imprisonment and fine or restitution that may be ordered, and any mandatory punishment or sentencing guideline system;
 - (2) the possibility of forfeiture of assets;
 - (3) other consequences of conviction such as deportation, and civil disabilities;
 - (4) any possible and likely sentence enhancements or parole consequences;
 - (5) the possible and likely place and manner of confinement;
 - (6) the effect of good-time credits on the sentence of the client and the general range of sentences for similar offenses committed by defendants with similar backgrounds.
- (b) In developing a negotiation strategy, counsel should be completely familiar with:
 - (1) concessions that the client might offer the prosecution as part of a negotiated settlement, including but not limited to:
 - (A) not to proceed to trial on the merits of the charges;
 - (B) to decline from asserting or litigating any particular pretrial motions;
 - (C) an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs.
 - (D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.
 - (2) benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:
 - (A) that the prosecution will not oppose the client's release on bail pending sentencing or appeal;
 - (B) that the defendant may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of a conviction;
 - (C) to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;

- (D) that the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;
 - (E) that the defendant will receive, with the agreement of the court, a specified sentence or sanction or a sentence or sanction within a specified range;
 - (F) that the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the preparer of the official presentence report, a specified position with respect to the sanction to be imposed on the client by the court;
 - (G) that the prosecution will not present, at the time of sentencing and/or in communication with the preparer of the official presentence report, certain information;
 - (H) that the defendant will receive, or the prosecution will recommend, specific benefits concerning the accused's place and/or manner of confinement and/or release on parole and the information concerning the accused's offense and alleged behavior that may be considered in determining the accused's date of release from incarceration.
- (c) In conducting plea negotiations, counsel should be familiar with:
- (1) the various types of pleas that may be agreed to, including a plea of guilty, a plea of nolo contendere, a conditional plea of guilty and a plea in which the defendant is not required to personally acknowledge his or her guilt (Alford plea);
 - (2) the advantages and disadvantages of each available plea according to the circumstances of the case;
 - (3) whether the plea agreement is binding on the court and prison and parole authorities.
- (d) In conducting plea negotiations, counsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority which may affect the content and likely results of negotiated plea bargains.

NLADA Guideline 6.3 — The Decision to Enter a Plea of Guilty

- (a) Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages and the potential consequences of the agreement.
- (b) The decision to enter a plea of guilty rests solely with the client, and counsel should not attempt to unduly influence that decision.

NLADA Guideline 6.4 — Entry of the Plea before the Court

- (a) Prior to the entry of the plea, counsel should:

- (1) make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;
 - (2) make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions and other consequences the accused will be exposed to by entering a plea;
 - (3) explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering the questions of the judge and providing a statement concerning the offense.
- (b) When entering the plea, counsel should make sure the full content and conditions of the plea agreement are placed on the record before the court.
- (c) After entry of the plea, counsel should be prepared to address the issue of release pending sentencing. Where the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. Where the client is in custody prior to the entry of the plea, counsel should, where practicable, advocate for and present to the court all reasons warranting the client's release on bail pending sentencing.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

26. Negotiation of Plea. Where appropriate, counsel shall attempt to negotiate the most favorable plea agreement possible under the circumstances.

27. Informing the Client of Plea Negotiations. Counsel shall accurately evaluate and convey to the client any offers of a negotiated plea.

Massachusetts Committee for Public Counsel Services (1988)

V. Disposition by Plea or Admission

5.5 Where an attorney believes that the client's desires are not in the client's best interest, the attorney may attempt to persuade the client to change her/her position. If the client remains unpersuaded, however, the attorney should assure the client he/she will defend the client vigorously.

5.6 Counsel must not attempt to unduly influence or coerce the accused into pleading guilty or to admitting to sufficient facts by any means, including, but not limited to, overstating the consequences, or by threatening to withdraw from representing the accused if he/she decided not to accept the proposed agreement and to proceed to trial.

Case Life of Adult Criminal Case

IV. MISDEMEANOR — CUSTODY PRETRIAL — PLEA/SENTENCING

- A. Need alternatives developed.
- B. Review any existing reports alone/with client.
- C. Initiate any investigation warranted.

- D. Explain significance of plea/types of pleas/plea contract, trials.
- E. Complete/review plea petition.
- F. Prepare sentencing statements, review with client.
- G. Docket and do plea and sentencing.
- H. Go over advice of rights with client.
- I. Pull up all other existing charges for negotiation/disposition or set other court matters (e.g., P.V.) as necessary.
- J. Direct and supervise trial assistant re: having alternatives in place.
- K. Assemble letters in support or witnesses for sentencing.

Case Life of Adult Criminal Case

VIII. PRETRIAL CONFERENCE

- A. Review file (if felony).
- B. Negotiate plea.
- C. Present alternatives.
- D. Candid review of position re: trial, corroborate with defense, discovery, motions, legal theory.
- E. Communicate pretrial offer to client, answer questions, assist client with making up mind, advise client of next court date.
- F. If misdemeanor, obtain offer.
- G. Check conflicts with trial date, pick alternative dates with D.A. if necessary.
- H. If plea, docket with chief criminal court, advise client; iron out any problems with D.A., if not attend certification, sit there and wait.
- I. Ex parte motion for new dates.
- J. File motions, observe thirty-five day rule.
- K. Issue subpoenas.
- L. Develop trial notebook.
- M. Prepare exhibits.
- N. Coordinate witnesses.
- O. Substantive trial preparation — final theory.
 - 1. Prepare witnesses.
 - 2. Outline direct and cross examination.
 - 3. Draft opening and closing.
 - 4. Prepare jury instructions.
 - 5. Voir dire.
 - 6. Make sure D.A. has been given witness statements and notice of other physical evidence available for review.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

7.1 Adjudication without trial.

- (a) Counsel may conclude, after full investigation and preparation, that under the evidence and the law the charges involving the client will probably be sustained. Counsel should so advise the client and, if negotiated plea are allowed under prevailing law, may seek the client's consent to engage in plea discussions with the prosecuting agency. Where the client denies guilt, the lawyer cannot properly

participate in submitting a plea of involvement when the prevailing law requires that such a plea be supported by an admission of responsibility of fact.

- (b) The lawyer should keep the client advised of all developments during plea discussions with the prosecuting agency and should communicate to the client all proposals made by the prosecuting agency. Where it appears that the client's participation in psychiatric, medical, social or other diagnostic or treatment regime would be significant in obtaining a desired result, the lawyer should so advise the client and, when circumstances warrant, seek the client's consent to participation in such a program.

New York State Bar Association: Law Guardian Representation Standards

Standard D-8

Dispositional alternatives should be carefully explored at this point, including possible community based programs or other dispositions which involve the minimum feasible loss of liberty. A dispositional strategy should be formulated prior to reaching negotiated agreement or the fact-finding hearing.

Standard D-10

The law guardian should not agree to an admission unless a) pre-trial discovery and evaluation has revealed no legal impediment to a finding, b) the child has been fully advised, in terms he can understand, of the facts, the alternatives, the consequences and the rights he is waiving, and c) the disposition is agreed to or there is an agreed upon range or limitation; an admission should not be entered without the intelligent consent of the child.

STANDARD 2.9 — Trial

Counsel should be prepared to provide quality representation and advocacy for the client at any court or jury trial.

■ Cases and Statutes

Defense counsel must be adequately prepared to control and direct the course of the case. ABA Standards, sec. 4-5.1; *Krummacher, supra* at 975. This includes calling witnesses, having arranged for their appearance, making necessary objections, and impeaching state witnesses where appropriate. *Tucker, supra* at 593; *Howe v. Cupp*, 55 Or App 247 (1981); *DeCoster II, supra*; *United States v. Moore*, 432 F2d 730 (3rd Cir. 1970). Defense counsel must interpose appropriate objections to the form and content of questions as well as any objectionable responses to those questions. Failure to conduct significant cross-examination or to impeach witnesses with prior inconsistent statements reflected grossly inadequate trial preparation. *Tucker, supra* at 593; *Hussick v. Oregon*, 19 Or App 915, 919 (1974); *Rook v. Cupp*, 18 Or App 608 (1974); Counsel has to advocate the defense with professional skill and

judgement. *Krummacher v. Gierloff*, 290 Or 867, 627 P2d 458 (1981). Failure of counsel to present corroborating evidence of alibi, *Yeager v. Maass*, 93 Or App 561, 763 P2d 184 (1988); Failing to object to "acquittal first" (requiring a finding of not guilty before determining guilt on a lesser charge) instructions is basis for post-conviction relief. *Tarwater v. Cupp*, 304 Or 639, 748 P2d 125 (1988); *Peaslee v. Keeney*, 81 Or App 488, 728 P2d 948 (1986).

■ Related Standards and Guidelines

Oregon Code of Professional Responsibility

DR 7-106 Trial Conduct

DR 7-107 Trial Publicity

DR 7-108 Communication with or Investigation of Jurors

DR 7-109 Contact with Witnesses

DR 7-110 Contact with Officials

NLADA Guideline 7.1 — General Trial Preparation

- (a) The decision to proceed to trial with or without a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.
- (b) Where appropriate, counsel should have the following materials available at the time of trial:
 - (1) copies of all relevant documents filed in the case;
 - (2) relevant documents prepared by investigators;
 - (3) voir dire questions;
 - (4) outline or draft of opening statement;
 - (5) cross-examination plans for all possible prosecution witnesses;
 - (6) direct examination plans for all prospective defense witnesses;
 - (7) copies of defense subpoenas;
 - (8) prior statements of all prosecution witnesses (e.g., transcripts, police reports);
 - (9) prior statements of all defense witnesses;
 - (10) reports from defense experts;
 - (11) a list of all defense exhibits, and the witnesses through whom they will be introduced;
 - (12) originals and copies of all documentary exhibits;
 - (13) proposed jury instructions with supporting case citations;
 - (14) copies of all relevant statutes and cases;
 - (15) outline or draft of closing arguments.
- (c) Counsel should be fully informed as to the rules of evidence, and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.
- (d) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.

- (e) Throughout the trial process, counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request, whenever necessary, that all trial proceedings be recorded.
- (f) Where appropriate, counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other appropriate clothing;
- (g) Counsel should plan with the client the most convenient system for conferring throughout the trial. Where necessary, counsel should seek a court order to have the client available for conferences.
- (h) Throughout preparation and trial, counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

NLADA Guideline 7.2 — Voir Dire and Jury Selection

- (a) Preparation
 - (1) Counsel should be familiar with the procedures by which a jury venire is selected in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.
 - (2) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury from a panel of the venire, and should be alert to any potential legal challenges to these procedures.
 - (3) Prior to jury selection, counsel should seek to obtain a prospective juror list.
 - (4) Where appropriate, counsel should develop voir dire questions in advance of trial. Counsel should tailor voir dire questions to the specific case. Among the purposes voir dire questions should be designed to serve are the following:
 - (A) to elicit information about the attitudes of individual jurors, which will inform about peremptory strikes and challenges for cause;
 - (B) to convey to the panel certain legal principles which are critical to the defense case;
 - (C) to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;
 - (D) to present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor;
 - (E) to establish a relationship with the jury, when the voir dire is conducted by an attorney.
 - (5) Counsel should be familiar with the law concerning mandatory and discretionary voir dire

inquires so as to be able to defend any request to ask particular questions of prospective jurors.

- (6) Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel should also be aware of any local rules concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.
- (7) Where appropriate, counsel should consider whether to seek expert assistance in the jury selection process.
- (b) **Examining the Prospective Jurors**
 - (1) Counsel should consider permission to personally voir dire the panel. If the court conducts voir dire, counsel should consider submitting proposed questions to be incorporated into the court's voir dire.
 - (2) Counsel should take all steps necessary to protect the voir dire record for appeal, including, where appropriate, filing a copy of the proposed voir dire questions or reading proposed questions into the record.
 - (3) If the voir dire questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the remaining jurors and that the court, rather than counsel, conduct voir dire as to those sensitive questions.
 - (4) In a group voir dire, counsel should avoid asking questions which may elicit responses which are likely to prejudice other prospective jurors.
- (c) **Challenges**
 - (1) Counsel should consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client.

NLADA Guideline 7.3 — Opening Statement

- (a) Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.
- (b) Counsel should be familiar with the law of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement.
- (c) Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring the opening statement until the beginning of the defense case.
- (d) Counsel's objective in making an opening statement may include the following:
 - (1) to provide an overview of the defense case;
 - (2) to identify the weaknesses of the prosecution's case;
 - (3) to emphasize the prosecution's burden of proof;

- (4) to summarize the testimony of witnesses, and the role of each in relationship to the entire case;
- (5) to describe the exhibits which will be introduced and the role of each in relationship to the entire case;
- (6) to clarify the juror's responsibilities;
- (7) to state the ultimate inferences which counsel wishes the jury to draw.
- (e) Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.
- (f) Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations weight against any such objections or requests. Such tactical considerations may include, but are not limited to:
 - (1) the significance of the prosecutor's error;
 - (2) the possibility that an objection might enhance the significance of the information in the jury's mind;
 - (3) whether there are any rules made by the judge against objecting during the other attorney's opening argument.

NLADA Guideline 7.4 — Confronting the Prosecution's Case

- (a) Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.
- (b) Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.
- (c) In preparing for cross-examination, counsel should be familiar with applicable law and procedures concerning cross-examinations and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.
- (d) In preparing for cross-examination, counsel should:
 - (1) consider the need to integrate cross-examination, the theory of the defense and closing argument;
 - (2) consider whether cross-examination of each individual witness is likely to generate helpful information;
 - (3) anticipate those witnesses the prosecutor might call in its case-in-chief in rebuttal;
 - (4) consider a cross-examination plan for each of the anticipated witnesses;

- (5) be alert to inconsistencies in a witness testimony;
- (6) be alert to possible variations in witnesses testimony;
- (7) review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
- (8) where appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses;
- (9) be alert to issues relating to witness credibility, including bias and motive for testifying.
- (e) Counsel should consider conducting a voir dire examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses whom the prosecutor may call. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.
- (f) Before beginning cross-examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If counsel does not receive prior statements of prosecution witnesses until they have completed direct examination, counsel should request adequate time to review these documents before commencing cross-examination.
- (g) Where appropriate, at the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgement of acquittal on each count charged. Counsel should request, when necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

NLADA Guideline 7.5 — Presenting the Defense Case

- (a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.
- (b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify.
- (c) Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production.
- (d) In preparing for presentation of a defense case, counsel should, where appropriate:
 - (1) develop a plan for direct examination of each potential defense witness;
 - (2) determine the implications that the order of witnesses may have on the defense case;
 - (3) consider the possible use of character witnesses;
 - (4) consider the need for expert witnesses.
- (e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.
- (f) Counsel should prepare all witnesses for direct and possible cross-examination. Where appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.
- (g) Counsel should conduct redirect examination as appropriate.
- (h) At the close of the defense case, counsel should renew the motion of judgment of acquittal on each charged count.

NLADA Guideline 7.6 — Closing Argument

- (a) Counsel should be familiar with the substantive limits on both prosecution and defense summation.
- (b) Counsel should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.
- (c) In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
 - (1) highlighting weaknesses in the prosecutor's case;
 - (2) describing favorable inferences to be drawn from the evidence;
 - (3) incorporating into the argument:
 - (A) helpful testimony from direct and cross-examinations;
 - (B) verbatim instructions drawn from the jury charge;
 - (C) responses to anticipated prosecution arguments;
 - (4) the effects of the defense arguments on the prosecution's rebuttal argument.
- (d) whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:
 - (1) whether counsel believes that the case will result in a favorable verdict for the client;
 - (2) the need to preserve the objection for a double jeopardy motion;
 - (3) the possibility that an objection might enhance the significance of the information in the jury's mind.

NLADA Guideline 7.7 — Jury Instructions

- (a) Counsel should be familiar with the local rules and the individual judge's practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.
- (b) Where appropriate, counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. Where possible, counsel should provide caselaw in support of the proposed instructions.
- (c) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.
- (d) If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of the proposed instructions or reading proposed instructions into the record.
- (e) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.
- (f) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request that the judge state the proposed charge to counsel before it is delivered to the jury.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

28. Preserving Right to Jury Trial If the case proceeds to trial, counsel should evaluate the client's best interests in deciding whether to waive a jury trial and discuss with the client the considerations relevant to that decision.

29. Voir Dire. Counsel should seek personal information regarding prospective jurors, either through voir dire or examination of jury questionnaires. Counsel shall ask voir dire questions pertinent to the case. Where required, counsel should submit voir dire questions to the court.

30. Opening Statement. Counsel shall make an opening statement consonant with the overall defense strategy, either at the beginning of trial or the beginning of the defense case, unless strategic reasons dictate otherwise.

31. Cross-Examination Counsel shall cross-examine and impeach prosecution witnesses to the extent and in the manner which reasonably appears likely to benefit the defense.

32. Waiving Prosecution Witnesses Counsel may waive the production of prosecution witnesses only where the appearance of those witnesses has no strategic benefit to the defense and the client is informed of the waiver.

33. Client's Decision to Testify: Counsel's Recommendation. Counsel shall discuss with the client the considerations

relevant to the client's decision whether to testify and shall recommend the decision which counsel believes to be in the client's best interest. The ultimate decision whether to testify is the client's.

34. Preparation of Defense Witnesses. Counsel shall strive to prepare defense witnesses for direct and cross-direct examination and advise them regarding appropriate courtroom dress and demeanor.

35. Objections: Offers of Proof. Counsel shall object to damaging inadmissible evidence unless the benefit to the client from its admission outweighs the harm, and shall make such other objections as are necessary to protect the client's right to fair trial and to appellate review. Where defense evidence is excluded, counsel should make such offer of proof as is necessary to protect the record.

36. Production of Defense Evidence. Counsel shall make reasonable efforts to produce witnesses and evidence necessary to present the defense case persuasively.

37. Directed Verdict. Counsel shall move outside the jury's presence, for a directed verdict at the close of the prosecution's proof if appropriate reasons for such motion exist. The motion should be repeated at the close of the defense case. If the verdict is unfavorable to the client, counsel should repeat the motion after verdict as a motion for judgement of acquittal.

38. Closing Argument. Counsel shall present a closing argument which explains why the client should not be found guilty as charged.

39. Jury Instructions. Counsel shall request jury instructions which present the applicable law in a manner most favorable to the defense. Counsel shall object to instructions which are legally erroneous or which, on the facts of the case, are unfairly damaging to the defense and shall place on the record or in the court file requests for instructions which are denied by the court.

Massachusetts Committee for Public Counsel Services (1988)

6.3 Bench Trial or Jury Trial

- (a) The decision to proceed to trial with or without a jury rests solely with the client after complete advice of counsel.
- (b) Counsel should fully advise the client of the advantages and disadvantages of either a bench trial or a jury trial. Counsel should exercise great caution before advising a jury waiver, especially without thorough discovery, including knowledge of the likely availability of prosecution witnesses, and their likely response to cross examination.

6.4 Voir Dire and Jury Selection

- (c) Challenges
 - (3) In exercising challenges for cause or peremptory strikes, counsel should consider both the panelists who may replace a person who is removed and the total number of peremptory challenges available.
 - (4) Counsel should make every effort to consult with the client in exercising challenges.

- (5) Counsel should be alert to prosecutorial misuse of peremptory challenges and should seek appropriate remedial measures.

Case Life of Adult Criminal Case

IX. COURT CALENDAR — CALL

- A. Advise client to be at call.
- B. Request offer if not yet received.

X. POST CALL

XI. TRIAL

- A. Meet the judge and staff if not yet acquainted.
- B. Motion in limine.
- C. Voir dire.
- D. State's opening statement — object appropriately.
- E. Defense opening.
- F. Make objections as appropriate to state's direct.
- G. Cross examine state's witnesses.
- H. MJOA — set up theory during state's case in chief; then cross examine on objections.
- I. Last minute preparation with client and witnesses.
- J. Try case.
- K. Object appropriately to state's cross.
- L. Closing statement.
- M. Make second motion for MJOA.
- N. Discuss jury instructions.
- O. Make motion on record.
- P. Ensure jury will review only those exhibits admitted into evidence.
- Q. Check verdict forms.
- R. Listen clearly to jury instructions.
- S. Put any exceptions to jury instructions or omissions on the record.
- T. Notify court where you will be; have client available.
- U. Prepare client for verdict.
- V. Prepare answers to jury questions.
- W. Accept verdict/hung jury.
- X. Poll jury.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

7.2 Formality, in general.

While the traditional formality and procedure of criminal trials may not in every respect be necessary to the proper conduct of juvenile court proceedings, it is the lawyer's duty to make all motions, objections or requests necessary to protection of the client's rights in such form and at such time as will best serve the clients legitimate interests at trial or on appeal

New York State Bar Association: Law Guardian Representation Standards

Standard E-1

The law guardian should present an opening statement.

Standard E-2

Prosecution witnesses should be cross-examined and an attempt made to impeach such witnesses by appropriate questioning, inconsistent prior statements, and other evidentiary methods.

Standard E-3

Appropriate expert witnesses should be called.

Standard E-4

Defense witnesses, including the child, should be questioned in accordance with pre-trial preparation; if necessary, character or rebuttal witnesses should be called.

Standard E-5

The law guardian should always present a summation.

Standard E-6

If appropriate, post-trial motions and briefs should be submitted.

STANDARD 2.10 — Sentencing Or Disposition

Counsel should:

1. be knowledgeable in disposition provisions and alternatives;
2. ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the disposition to be imposed;
3. ensure all reasonably available mitigating and favorable information is presented to the court;
4. in delinquency cases and in adult criminal cases as appropriate, be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate or unfavorable information presented by other parties;
5. in delinquency cases, advocate for or develop dispositional resources that will aid the client in obtaining the least restrictive disposition, and obtain all appropriate orders to protect the youth's rights and interests.

■ **Cases and Statutes**

Representation at sentencing, as in a trial, must be adequate. *Lyons v. Pearce*, *supra* at 567; *Carroll v. Cupp*, 49 Or App 773, 776 (1980); *DeCoster II*, *supra* at 281. Counsel should object to any sentence inconsistent with the law, (e.g. Mandatory minimum not permitted for juvenile. *Wells v. Peterson*, 315 Or 233, 844 P2d 192 (1992). Trial attorney failed to object to sentencing order including restitution and costs although because the defendant was indigent and sentenced to prison, he could not pay restitution and costs. *Steffans v. Keeney*, 82 Or App 625, 728 P2d 948 (1986). Counsel requested court recommend against deportation as permitted by federal law. *Lyons v. Pearce*, 298 Or 554, 694 P2d 969 (1984). Counsel should move to

withdraw plea if prosecutor fails to follow plea agreement.
Chilcote v. Zenon, 105 Or App 393, 804 P2d 521 (1991).

■ **Related Standards and Guidelines**

NLADA Guideline 8.1 — Obligations of Counsel in Sentencing

- (a) Among counsel's obligations in the sentencing process are:
 - (1) where a defendant chooses not to proceed to trial, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, and financial implications;
 - (2) to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;
 - (3) to ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court;
 - (4) to develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;
 - (5) to ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful or is otherwise improper is stricken from the text of the presentence investigation report before distribution of the report;
 - (6) to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted.

NLADA Guideline 8.2 — Sentencing Options, Consequences and Procedures

- (a) Counsel should be familiar with the sentencing provisions and options applicable to the case, including:
 - (1) any sentencing guideline structure;
 - (2) deferred sentence, judgement without a finding, and diversionary probation;
 - (3) expungement and sealing of records;
 - (4) probation or suspension of sentence and permissible conditions of probation;
 - (5) restitution;
 - (6) fines;
 - (7) court costs;
 - (8) imprisonment including any mandatory minimum requirements;
 - (9) confinement in mental institutions;
 - (10) forfeiture.

- (b) Counsel should be familiar with direct and collateral consequences of the sentence and judgement, including:
 - (1) credit for pre-trial detention;
 - (2) parole eligibility and applicable parole release ranges;
 - (3) effect of good-time credits on the client's release date and how those credits are earned and calculated;
 - (4) place of confinement and level of security and classification;
 - (5) self-surrender to place of custody;
 - (6) eligibility for correctional programs and furloughs;
 - (7) available drug rehabilitation programs, psychiatric treatment, and health care;
 - (8) deportation;
 - (9) use of the conviction for sentence enhancement in future proceedings;
 - (10) loss of civil rights;
 - (11) impact of a fine or restitution and any resulting civil liability;
 - (12) restrictions on or loss of license.
- (c) Counsel should be familiar with the sentencing procedures, including:
 - (1) the effect that plea negotiations may have upon the sentencing discretion of the court;
 - (2) the procedural operation of any sentencing guideline system;
 - (3) the effect of a judicial recommendation against deportation;
 - (4) the practices of the officials who prepare the presentence report and the defendant's rights in that process;
 - (5) the access to the presentence report by counsel and the defendant;
 - (6) the prosecution's practice in preparing a memorandum on punishment;
 - (7) the use of a sentencing memorandum by the defense; the opportunity to challenge information presented to the court for sentencing purposes;
 - (8) the opportunity to challenge information presented to the court for sentencing purposes;
 - (9) the availability of an evidentiary hearing to challenge information and the applicable rules of evidence and burdens of proofs at such a hearing;
 - (10) the participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.

NLADA Guideline 8.3 — Preparation for Sentencing

- (a) In preparing for sentencing, counsel should consider the need to:
 - (1) inform the client of the applicable sentencing requirements, options, and alternatives, and the

- likely and possible consequences of the sentencing alternatives;
- (2) maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;
 - (3) obtain from the client relevant information concerning such subjects as her or her background and personal history, prior criminal record, employment history and skills, education, medical history and condition, and financial status, and obtain from the client sources through which the information can be corroborated;
 - (4) ensure that the client has adequate time to examine the presentence report;
 - (5) inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, considering the possible consequences that and admission of guilt may have upon an appeal, subsequent retrial or trial on other offenses;
 - (6) prepare the client to be interviewed by the official preparing the presentence report;
 - (7) inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;
 - (8) inform the client of the sentence or range of sentences counsel will ask the court to consider; if the client and counsel disagree as to the sentence or sentences to be urged upon the court, counsel shall inform the client of his or her right to speak personally for a particular sentence or sentences;
 - (9) collect documents and affidavits to support the defense position and, where relevant, prepare witnesses to testify at the sentencing hearing; where necessary, counsel should specifically request the opportunity to present tangible and testimonial evidence.

NLADA Guideline 8.4 — The Official Presence Report

- (a) Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or similar document. In addition, counsel should:
 - (1) determine whether a presentence report will be prepared and submitted to the court prior to sentencing; where preparation of the report is optional, counsel should consider the strategic implications of requesting that a report be prepared;
 - (2) provide to the official preparing the report relevant information favorable to the client, including, where appropriate, the defendant's version of the offense;

- (3) review the completed report;
- (4) take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report;
- (5) take appropriate steps to preserve and protect the client's interests where the defense challenges information in the presentence report as being erroneous or misleading and;
 - A. the court refuses to hold a hearing on a disputed allegation adverse to the defendant;
 - B. the prosecution fails to prove an allegation;
 - C. the court finds an allegation not proved.

Such steps include requesting that a new report be prepared with the challenged or unproved information deleted before the report or memorandum is distributed to correctional and/or parole officials.

- (6) Where appropriate counsel should request permission to see copies of the report to be distributed to be sure that the information challenged has actually been removed from the report or memorandum.

NLADA Guideline 8.5 — The Prosecutors Sentencing Position

- (a) Counsel should attempt to determine, unless there is a sound tactical reason for not doing so, whether the prosecution will advocate that a particular type or length of sentence be imposed.
- (b) If a written sentencing memorandum is submitted by the prosecution, counsel should request to see the memorandum and verify that the information presented is accurate; if the memorandum contains erroneous or misleading information, counsel should take appropriate steps to correct the information unless there is a sound strategic reasons for not doing so.
- (c) If the defense request to see the prosecution memorandum is denied, an application to examine the document should be made to the court or a motion made to exclude consideration of the report by the court and to prevent distribution of the memorandum to parole and correctional officials.

NLADA Guideline 8.6 — The Defense Sentencing Memorandum

- (a) Counsel should prepare and present to the court a defense sentencing memorandum where there is a strategic reason for doing so. Among the topics counsel may wish to include in the memorandum are:
 - (1) challenges to incorrect or incomplete information in the official presentence report and any prosecution sentencing memorandum;
 - (2) challenges to improperly drawn inferences and inappropriate characteristics in the official presentence report and any prosecution sentencing memorandum;

- (3) information contrary to that before the court which is supported by affidavits, letters, and public records;
- (4) information favorable to the defendant concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, education background, and family and financial status;
- (5) information which would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crimes;
- (6) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities;
- (7) information of a sentencing proposal.

NLADA Guideline 8.7 — The Sentencing Process

- a. Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's interest.
- b. Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.
- c. In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. Where a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the defendant, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.
- d. Where information favorable to the defendant will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the defendant.
- e. Where the court has the authority to do so, counsel should request specific orders of recommendations from the court concerning the place of confinement, parole eligibility, psychiatric treatment or drug rehabilitation, permission for the client to surrender directly to the place of confinement and against the deportation of the defendant.
- f. Where appropriate, counsel should prepare the client to personally address the court.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

40. *Preparing Client for Presentence or Dispositional Investigation.* Counsel shall aid the client in preparing for a presentence or dispositional interview and shall advise the client of the potential consequences of making any previously undisclosed admissions of guilt.

41. *Providing Information to Probation Officer.* Where appropriate, counsel shall provide to the probation officer favorable information about the client and information about the availability of suitable alternatives to incarceration or detention.

State Bar of Michigan "Standards for Assigned Counsel," (1995)

42. *Review of Sentencing or Dispositional Information.* Counsel shall review with the client the accuracy of any information to be presented to the sentencing judge, including any dispositional reports, the presentence report and the sentencing information report.

43. *Correcting Sentencing or Dispositional Information.* Counsel shall seek at or before sentencing or disposition to have incorrect, unfavorable information in any report corrected or stricken, to have information added to any report, and where applicable, to have harmful miscalculations of the sentencing guidelines score recomputed.

44. *Presenting Information at Sentencing or Disposition.* Counsel shall present to the sentencing court information favorable to the client and suitable dispositional alternatives to incarceration or detention, where appropriate.

45. *Preparing Client for Sentencing or Disposition.* Counsel shall aid the client in preparing for allocation at sentencing or disposition. The client should be informed sufficiently in advance of sentencing or disposition of the right to allocation in order to prepare for effective allocution.

Performance Standards for Attorneys: The Inmate Perspective

Sentencing Issues Related to the Presentence Investigation

- 1) Failure to impress upon the defendant/client the importance of the PSI.
- 2) Failure to recognize and challenge detrimental information.
- 3) Allowing judges to make nonspecific findings regarding important sentencing matters. This occurs when the court makes a finding regarding only the appropriate quantitative *range* of drugs or financial loss to be used in sentencing rather than the specific amount.
- 4) Failing to require the court to make a specific finding as to the scope of a conspiracy participant's understanding of the agreement or relevant conduct.

Performance Standards for Attorneys: The Inmate Perspective

Sentencing Issues Unrelated to the PSI

- 1) Neglecting to ask for downward departure or minimal participant consideration.
- 2) Failing to request the abatement of interest on fines and restitution.
- 3) Lack of diligence in obtaining clarification of ambiguous statements in the judgement, such as when payments must begin on a fine or restitution.

Case Life of Adult Criminal Case

XI. TRIAL (CONTINUED)

- Y. If appropriate, request PSI, otherwise prepare client for PSI.
- Z. Be present at PSI if needed.
- AA Present supplemental materials/alternatives to PSI writer.
- BB. Prepare for sentencing as outlined above.
- CC. Obtain and review PSI alone and with client — isolate objections, present presentencing or seek D.A.'s stipulation to exclusion.
- DD. Notice and advise of rights and PC rights.
- EE. Be prepared to deal with issues raised, dangerous offender or sentencing guidelines.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

9.1 In general.

The active participation of counsel at disposition is often essential to protection of clients' rights and to furtherance of their legitimate interests. In many cases the lawyer's most valuable service to clients will be rendered at this stage of the proceeding.

9.2 Investigation and preparation.

- (a) Counsel should be familiar with the dispositional alternatives available to the court, with its procedures and practices that the disposition stage, and with community services that might be useful in the formation of a dispositional plan appropriate to the client's circumstances.
- (b) The lawyer should promptly investigate all sources of evidence including any reports or other information that will be brought to the court's attention, and interview all witnesses material to the disposition decision.
 - (i) If access to social investigation, psychological, psychiatric or other reports or information is not provided voluntarily or promptly, counsel should be prepared to seek their disclosure and time to study them through formal measures.
 - (ii) Whether or not social and other reports are readily available the lawyer has a duty independently to investigate the client's circumstances, including such factors as previous history, family relations, economic condition and any other information relevant to disposition.
- (c) The lawyer should seek to secure the assistance of psychiatric, psychological, medical or other expert personnel needed for purposes of evaluation, consultation or testimony with respect to formation of a dispositional plan.

9.3 Counseling prior to disposition.

- (a) The lawyer should explain to the client the nature of the disposition hearing, the issues involved and the alternatives open to the court. The lawyer should also explain fully and candidly the nature, obligations and consequences of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any

institution to which commitment is possible, and the probable duration of the client's responsibilities under the proposed dispositional plan. Ordinarily, the lawyer should not make or agree to a specific dispositional recommendation without the client's consent.

- (b) When psychological or psychiatric evaluations are ordered by the court or arranged by counsel prior to disposition, the lawyer should explain the nature of the procedure to the client and encourage the client's cooperation with the person or persons administering the diagnostic procedure . . .

9.4 Disposition hearing.

- (a) It is the lawyer's duty to insist that a proper procedure be followed throughout the disposition stage and that orders rendered be based on adequate reliable evidence.
 - (i) Where the dispositional hearing is not separate from adjudication or the court does not have before it all evidence required by statute, rules of court or the circumstances of the case, the lawyer should seek a continuance until such evidence can be presented if to do so would serve the client's interests.
 - (ii) The lawyer at disposition should be free to examine fully and to impeach any witness whose evidence is damaging to the client's interests and to challenge the accuracy, credibility and weight of any reports, written statements or other evidence before the court. The lawyer should not knowingly limit or forego examination or contradiction by proof of any witness, including a social worker or probation department officer when failure to examine fully will prejudice the client's interests. Counsel may seek to compel the presence of witnesses whose statements of fact or opinion are before the court or the production of other evidence on which conclusions of fact presented at disposition are based.

New York State Bar Association: Law Guardian Representation Standards

Standard F-1

The law guardian should request the court to order reports which may be helpful, including mental health studies or other evaluations.

Standard F-2

Every realistic dispositional alternative should be explored, including, where relevant, specific placements with residential or non-residential programs; the law guardian should develop a specific dispositional plan to present to the court.

Standard F-3

If the law guardian's dispositional plan is likely to be disputed, potential witnesses, including parents, school officials or neighbors, should be inter-

viewed; evidence should be gathered to support the specific dispositional plan.

Standard F-4

If helpful in forming or furthering the law guardian's dispositional plan, the law guardian should visit the child's home or meet with school officials or other relevant persons. @ann = Standard F-5

The probation report should be read prior to the dispositional hearing.

Standard F-7

The desires of the child should be ascertained and the child and the parent should be advised of the potential alternatives. The child should fully consent to the specific disposition which the law guardian intends to present and argue.

Standard G-2

If appropriate in light of the seriousness of factual disputes or other reasons, the maker of relevant reports, including the probation officer, should be examined.

Standard G-5

The law guardian should present and argue a complete dispositional alternative consistent with the needs and desires of the child, including specific programs or dispositional orders, the specific duration of placement or other disposition and, if appropriate, alternative possibilities.

Standard H-1

The law guardian should explain to the child and the parents, in terms the child can understand, the disposition and its consequences, including the rights and possibilities of post-trial motions or requests for new hearings, the consequences of possible violations of the dispositional order and the continuing jurisdiction of the court.

■ **Commentary:**

A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings, p.53

"Thus, attorneys need to be knowledgeable about eligibility requirements and funding mechanisms for various programs, including special education; "nonlegal" topics such as the causes of delinquency and family conflict; policies and procedures of the agencies coming into contact with the court; ways to use the skills of other professionals such as psychiatrists or psychologists; and the availability of local programs and facilities for juvenile offenders."

STANDARD 2.11 — Post-Disposition Procedures

Counsel should be familiar with the procedures available to the client after disposition.

■ **Cases and Statutes**

Trial counsel must assist in the designation of the record. *Accocella v. Allen*, 288 Or 175, 187 (1979).

■ **Related Standards and Guidelines**

NLADA Guideline 9.1 — Motion for a New Trial

- (a) Counsel should be familiar with the procedures available to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.
- (b) When a judgement of guilty has been entered against the defendant after trial, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors counsel should consider include:
 - (1) The likelihood of success of the motion, given the nature of the error or errors that can be raised;
 - (2) the effect that such a motion might have upon the defendant's appellate rights, including whether the filing of such a motion is necessary to, or will assist in, preserving the defendant's right to raise on appeal the issues that might be raised in the new trial motion.

NLADA Guideline 9.2 — Right to Appeal

- (a) Counsel should inform the defendant of his or her right to appeal the judgement of the court and the action that must be taken to perfect an appeal. In circumstances where the defendant wants to file an appeal but is unable to do without the assistance of counsel, the attorney should file the notice in accordance with the rules of the court and take such other steps as are necessary to preserve the defendant's rights to appeal, such as ordering transcripts of the trial proceedings.
- (b) Counsel's advice to the defendant should include an explanation of the right to appeal the judgement of guilty and, in those jurisdictions where it is permitted, the right to appeal the sentence imposed by the court.
- (c) Where the defendant takes an appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial court.

NLADA Guideline 9.3 — Bail Pending Appeal

- (a) Where a client indicates a desire to appeal the judgement and/or sentence of the court, counsel should inform the client of any right that may exist to be released on bail pending the disposition of the appeal.
- (b) Where an appeal is taken and the client requests bail pending appeal, trial counsel should cooperate with appellate counsel in providing information to pursue the request for bail.

NLADA Guideline 9.4 — Self-Surrender

Where a custodial sentence has been imposed, counsel should consider requesting a stay of execution of the judgement to permit the client to report directly to the place of confinement.

NLADA Guideline 9.5 — Sentence Reduction

Counsel should inform the client of procedures available for requesting a discretionary review of, or reduction in the sentence imposed by the trial court, including any time limitations that apply to such a request.

NLADA Guideline 9.6 — Expungement or Sealing of Record

Counsel should inform the client of any procedures available for requesting that the record of conviction to be expunged or sealed.

Performance Standards for Attorneys: The Inmate Perspective

Post-Trial Issues

- 1) Failure to discuss or consider issues and ideas for the appeal proffered by the defendant.
- 2) Unwillingness to allow the defendant to review the appeal briefs prior to their filing.
- 3) A continuing reluctance to take calls or answer letters.

Performance Standards for Attorneys: The Inmate Perspective

Recommendations

- 1) Guidelines depicting acceptable time for response to client letters and phone calls.
- 2) Guidelines recommending that all possible defenses to a defendant's charges be explored prior to entering into plea negotiations.
- 3) The implementation of standards which define and convey the concept that the attorney is providing a service to the client and the relationship should therefore be conducted accordingly.

Case Life of Adult Criminal Case

XI. TRIAL (CONTINUED)

- FF. Assist defendant with filing notice of appeal, motion for new trial, if appropriate.
- GG. Provide any assistance needed to appeals attorney.
- HH. Closing letters, time reports, billing to court.
- II. Working with family, making arguments and preparing for parole board hearing.
- JJ. Keep track of billing and modify office budget accordingly.

American Bar Association Juvenile Justice Standards: Counsel For Private Parties

10.1 Relations with the client after disposition.

- (a) The lawyer's responsibility to the client does not necessarily end with dismissal of the charges or entry of a final dispositional order. The attorney should be prepared to counsel and render or assist

in securing appropriate legal services for the client in matters arising from the original proceeding.

- (i) If the client has been found to be within the juvenile court's jurisdiction, the lawyer should maintain contact with both the client and the agency or institution involved in the disposition plan in order to ensure that the client's rights are respected and, where necessary, to counsel the client and the client's family concerning the dispositional plan.

- (ii) Whether or not charges against the client have been dismissed, where the lawyer is aware that the client . . . needs and desires community or other medical, psychiatric, psychological, social or legal services, he or she should render all possible assistance in arranging for such services.

- (b) The decision to pursue an available claim for post dispositional relief from judicial and correctional or other administrative determination related to juvenile court proceedings, including appeal, habeas corpus or an action to protect the client's right to treatment is ordinarily the client's responsibility after full consultation with counsel.

10.2 Post dispositional hearings before the juvenile court.

- (a) The lawyer who represents a client during initial juvenile court proceedings should ordinarily be prepared to represent the client with respect to proceedings to review or modify adjudicative or dispositional orders made during earlier hearings or to pursue any affirmative remedies that may be available to the client under local juvenile court.
- (b) The lawyer should advise the client of the pendency or availability of a post dispositional hearing or proceeding and of its nature, issues and potential consequences. Counsel should urge and, if necessary, seek to facilitate the prompt attendance at any such hearing of the client of any material witnesses who may be called.

10.3 Counsel on Appeal

- (a) Trial counsel, whether retained or appointed by the court, should conduct the appeal unless new counsel is substituted by the client or by the appropriate court. Where there exists an adequate pool of competent counsel available for the assignment to appeals from juvenile court orders and substitution will not work substantial disadvantage to the client's interests, new counsel may be appointed in place of trial counsel. . .
- (c) Counsel on appeal, after reviewing the record below and undertaking any other appropriate investigation, should candidly inform the client as to whether there are meritorious grounds for appeal and the probable results of any such appeal, and should further explain the potential advantages and disadvantages associated with appeal. However, appellate counsel should not seek to withdraw

from a case solely because his or her own analysis indicates that the appeal lacks merit.

10.4 Conduct of appeal

The rules generally governing conduct of appeals in criminal and civil cases govern conduct of appeals in juvenile court matters.

10.5 Post dispositional remedies: Protection of the client's right to treatment

- (a) A lawyer who has represented a client through trial and/or appellate proceedings should be prepared to continue representation when post dispositional action, whether affirmative or defensive, is sought, unless new counsel is appointed at the request of the client or continued representation would, because of geographical considerations or other factors, work unreasonable hardship.
- (b) Counsel representing a client in post dispositional matters should promptly undertake any factual or legal investigation in order to determine whether grounds exist for relief from juvenile court or administrative action. If there is reasonable prospect of a favorable result, the lawyer should advise the client and, if their interests are not adverse, the client's parents of the nature, consequences, probable outcome and advantages or disadvantages associated with such proceedings.
- (c) The lawyer engaged in post dispositional representation should conduct those proceedings according to the principles generally governing representation in juvenile court matters.

New York State Bar Association: Law Guardian Representation Standards

Standard H-3

The child and the parents should be advised in writing of the right to appeal, including the right to appeal as a poor person. The possibilities of appeal should be explored fully, including possible grounds. The law guardian should file a notice of appeal and assure that the appeal is perfected unless the child indicates explicitly and intelligently his decision to waive and appeal.

Standard H-3

The law guardian should examine the dispositional order to ensure that the order conforms to the agreed disposition or finding.

■ **Commentary:**

A Call For Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings, p. 55

"The failure to maintain representation during the entire period of juvenile court jurisdiction is a serious problem. It means that attorneys do not monitor their clients' progress in programs and institutional placements or assure that the services ordered by courts are actually provided and that conditions in programs and institutions are lawful. As a consequence, needed modifications in court orders may not come to official attention until youth have acted out or committed new offenses. New counsel appointed at the post disposition stage are unlikely to develop a relationship with the children or their families, or have the background needed to best articulate their clients' needs and capabilities."

Performance Standards

Chapter 3 Specific Standards For Representation In Juvenile Dependency Cases

STANDARD 3.1 — Prerequisites For Representation

Counsel should be proficient in applicable substantive and procedural juvenile law and should have appropriate experience, skill and training for the type of representation required.

■ Related Standards and Guidelines

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

Prerequisites for Court Appointment in Dependency Court

1. The attorney should have a solid familiarity with and receive ongoing training on the Welfare and Institutions Code statutory requirements, the Evidence Code, local and state court rules, court policies, relevant case law, the practice guidelines set forth in this document and the substantive, ethical and procedural issues unique to practice in Dependency Court. The attorney should keep current with changes in statutory and case law.
2. Attorneys should receive training on the representation of children, including, but not limited to, statutory and case law.
3. The Attorney should be familiar with and receive ongoing training on the structure and functioning of the Juvenile Court, the Child Advocates Program, the Department of Children's Services, including Emergency Response and family preservation, reasonable efforts, placement, and adoption.
4. Attorneys new to Dependency Court should:
 - a. observe and/or participate in each type of dependency hearing prior to accepting an appointment in Dependency Court;
 - b. work and consult with an assigned mentor for the first three months; and
 - c. visit two types of placement centers, a shelter care, foster home, or group home;

Guidelines for Continued Appointment in Dependency Court

The Attorney should be familiar with and receive ongoing training in the following areas:

1. The Psychological and medical aspects relating to dependency court matters, particularly in the areas of physical, emotional and sexual abuse, child development stages, and patterns of child growth related to neglect and non-organic failure to thrive.

2. Interviewing techniques for children.
3. Child developmental stages, including the child's cognitive, emotional and social growth stages and language skills.
4. Child development as it relates to children as witnesses and the impact of the court process on the child.
5. Reasonable efforts, treatment resources and family preservation services available and the problems they are designed to address.
6. The various types of minute orders which the Dependency Court can issue.
7. The types of placement and treatment available to children.
8. Cultural and ethnic differences as they relate to child rearing.
9. Educational, mental health, medical treatment, and other resources available to children.
10. Government benefits available to assist families involved in the dependency system.
11. Medical status examinations and their effect on children.
12. Psychotropic drugs, their use and effect on children and resources for determining the appropriateness of their use.
13. Resources for the treatment and recognition of the physical and psychological aspects of physical abuse, sexual abuse, emotional abuse and the non-organic failure to thrive.
14. Patterns of child growth as related to neglect.
15. Immigration law issues, consequences and resources related to parents and children in Dependency Court.
16. The Indian Child Welfare Act, Native American families and children and appropriate resources.
17. Emancipation laws, procedures, and resources.
18. substance abuse and resources for substance abusing families.
19. Domestic violence and appropriate resources.
20. Family dynamics and cultural aspects of families.
21. Transitional aspects of placement and child's return home.
22. Other areas of the law that occasionally cross over into dependency cases such as tort actions, probate, and family law.

Qualification Standards for Court Appointed Counsel to Represent Indigent Persons at State Expense (Oregon)

Judicial Department Policy Statement)

Section G. Juvenile Cases, Including Delinquency, Remand Hearings, Neglect, Abuse, Other Dependency Cases, Status Offenses and Termination of Parental Rights

An attorney is qualified for appointment to juvenile cases, under ORS Chapter 419, if he or she:

1. For all cases, has knowledge of juvenile justice statutes, case law, standards, and procedures; has observed at least one contested juvenile court case; is generally familiar with services available to children and parents in the juvenile system; and has reviewed and is familiar with the following materials:
 - a. ORS, Chapter 419, Oregon Juvenile Code.
 - b. ORS, Chapter 417, Interstate Compact on Juveniles and the Community Juvenile Services Act.
 - c. ORS, Chapter 418, Child Welfare Services and Reporting of Child Abuse.
 - d. ORS, Chapter 420, Juvenile Training Schools and Youth Care Centers.
 - e. Oregon State Bar, *Juvenile Law* (1994, Supp. 1995).
 - f. Pub. L. 95-272, Adoption Assistance and Child Welfare Act of 1980.
 - g. Pub. L. 95-608, Indian Child Welfare Act of 1978, 25 USC sections 1901-1963 (1982).
 - h. Education of the Handicapped Act of 1975, 20 USC sections 1400-1485 (1982, Supp. 1987).
 - i. Pub. L. 93-112, Title V section 504, Rehabilitation Act of 1973, as amended, 29 USC section 794 (1982).

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

1. Requirements Prior to Representation.
Prior to being appointed to represent any party in a dependency matter, all attorneys should:
 - a. Be familiar with dependency law and related areas.
 - b. Review any available videos of sample 300 hearings and other proceedings as required by the presiding juvenile court judge.
 - c. Visit a shelter/emergency foster home/juvenile detention center.
 - d. "Actively participate" in at least 3 dependency actions from detention through disposition.
2. Continuing Educational Requirements
Similar to OSB Task Force on Indigent Defense II Standard 3.1
3. The attorney must, first and foremost, strive to acquire and develop basic advocacy skills such as client interviewing, case investigation, negotiation and trial practice.
4. The child's attorney should be especially aware of statutory or case law that pertains particularly to

children who are the subject of dependency actions or their attorneys.

5. The following are examples of issues that may arise in the course of representing children. Knowledge in these areas will enhance the attorney's ability to advise and represent child clients.
 - a. Guardianship
 - b. Emancipation
 - c. Mental Health
 - d. Education/School Discipline
 - e. Wardships
 - f. Community Resources — therapy, recreation, shelter, etc.

■ **Commentary:**

Standards of Practice for Representing Children (Ann M. Haralambie)

"A properly trained child's attorney should have the information, or ability to acquire information and consultation, which will permit a professional and objective assessment of what the child's position should be, incorporating any input the child client is capable of providing, in those cases where the child is not sufficiently mature to form and express a reasoned position."

Independent Counsel for Children, Shannan L. Wilber, Family Law Quarterly

"Attorneys can be trained as to how to represent young children. Additionally, an attorney should be specially trained to establish an effective attorney-client relationship with abused and neglected children. Attorneys who had undergone such training have been found to be more effective advocates for the children, resulting in more specific court orders for treatment and assessment and an accelerated court process. This training should focus on the causes and dynamics of child abuse and neglect, identify aspects of child development relevant to determining an abused and neglected child's psychological needs at various ages, and provide information concerning local intervention programs designed to assist families at risk."

Resources Guidelines: Improving Court Practice in Child Abuse and Neglect Cases (National Council of Juvenile and Family Court Judges)

"Before becoming involved in an abuse and neglect case, attorneys should have the opportunity to assist more experienced attorneys in their jurisdiction. The should also be trained in, or familiar with:

Legislation and case law on abuse and neglect, foster care, termination of parental rights, and adoption of children with special needs

The causes and available treatment for child abuse and neglect.

The child welfare and family preservation services available in the community and the problems they are designed to address.

The structure and functioning of the child welfare agency and court systems, the services for which the agency will routinely pay, and the services for which the agency either refuses to pay or is prohibited by state law or regulation from paying.

Local experts who can provide attorneys with consultation and testimony on the reasonableness and appropriateness of efforts made to safely maintain the child in the home.

America's Children At Risk: A National Agenda for Legal Action (American Bar Association Presidential Working Group on the Unmet Legal Needs of Children and Their Families)

"Children, simply by virtue of being children, are denied legal rights that adults take for granted. Many children routinely appear in court without benefit of legal counsel in situations where any adult who had the resources or know-how would retain a lawyer. Many children involved in legal proceedings concerning child abuse and neglect, custody, visitation disputes, status offenses, delinquency, and other important matters are unrepresented from the beginning to the end of their cases. The lack of legal counsel is particularly devastating to children, who often cannot express their own views and may not fully understand the choices they are making . . ."

"Even when children are represented, the representation they receive is sometimes inadequate . . . Children's cases are often 'processed,' not advocated, and too frequently children's interests are poorly represented . . . Meaningful protection of children's rights requires that children be represented by highly skilled counsel at critical stages of critical proceedings that involve children is vital in a system where decisions about children's rights and liberties and those of their parents are decided."

Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness, Rebecca H. Heartz, Family Law Quarterly

"Four different models have been identified as the most common methods of representation. In the first model, an attorney is required although a volunteer may also be appointed. In the second model, both an attorney and a volunteer are required. In the third model, either an attorney or a volunteer may be appointed as GAL. In the last model, the volunteer may be appointed as GAL.

Twenty-three states require that the GAL be an attorney. Another twenty-three states have statutes for the appointment of either an attorney or a volunteer; the local judge makes the appointment. In a small number of states, GAL representation may be provided by social workers, probation officers, or court counselors. When attorneys are appointed as GALs, they may be private attorneys chosen from a list provided to the judge. In other jurisdictions, staff attorneys, like public defenders or legal aid attorneys, represent the child. Some jurisdictions rely on a combination of private and staff attorneys."

Juvenile Law (Oregon State Bar Continuing Legal Education) Section 12.1

"A child who is the subject of a juvenile court proceeding is neither plaintiff nor a defendant in the traditional sense that those terms are used in legal actions. Such a child is often a victim, having more at stake in a dependency proceeding than the typical victim has in a criminal case. By statute, a child is a party to a juvenile court dependency proceeding."

Juvenile Law (Oregon State Bar Continuing Legal Education) Section 12.25

"While trial skills, such as knowledge of the evidence code and the ability to cross-examine expert witnesses, can be as crucial in dependency cases as in any other litigation, the client benefits from a lawyer who knows or becomes familiar with the workings of the unique system through which the case is moving. The special and often complex issues raised by Indian children, or putative fathers, if unrecognized or ignored, can cause substantial delays in cases. Attorneys who are not familiar with the juvenile system may fail to realize that a dependency case exists in an environment heavily influenced by social workers."

STANDARD 3.2 — General Duties And Responsibilities Of Counsel To Client; Avoiding Conflict Of Interests

Counsel or counsel associated in practice should not represent two or more clients who are parties to the same or consolidated juvenile dependency cases unless it is clear there is no conflict of interest between the parties. Counsel should act in a professional manner in zealously advocating the client's position.

■ Related Standards and Guidelines

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. The attorney should make inquiries necessary to determine at the outset of the proceedings whether a conflict exists in the representation of a party.
2. Attorneys should avoid ex parte communication regarding pending cases with the judicial officer before whom the case is pending.

Qualification Standards for Court Appointed Counsel to Represent Indigent Persons at State Expense (Oregon Judicial Department Policy Statement)

Standard 2.1 Attorney Case Loads

Attorneys appointed to represent indigent persons at state expense must provide each client the time and effort necessary to ensure competent and adequate representation. Neither defender organizations nor assigned counsel should accept work loads that, by reason of their excessive size or complexity, interfere with rendering competent and adequate representation or lead to the breach of professional obligations.

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

1. All attorneys appearing in dependency actions have the same general mandate: to vigorously represent their clients' interests within applicable legal and ethical boundaries. This includes:
 - a. investigating the allegations
 - b. advising clients of risks and benefits of possible courses of action
 - c. determining clients' interests
 - d. representing those interests vigorously to the court and other parties

See *American Bar Association Juvenile Justice Standards: Counsel for Private Parties* under Standard 2.2.

■ **Commentary**

Juvenile Law (Oregon State Bar Continuing Legal Education) Section 12.23

"The conflict inherent in being retained by an adult to represent a child is more easily resolved. The attorney owes no duty to the person who pays for the representation, and has no confidential relationship with that person. The child is the client DR 5-108(A)-(B)."

STANDARD 3.3 — Role Of Counsel

It is the duty of counsel to determine whether a child client is capable of considered judgment. If counsel determines that the child is not capable of considered judgment, counsel should advocate what is in the client's best interests.

When representing parents and children capable of considered judgment, counsel should seek the lawful objectives of the client and should not substitute counsel's judgment in those case decisions that are the responsibility of the client.

■ **Related Standards and Guidelines**

American Bar Association Center for Professional Responsibility, Model Rules of Professional Conduct (1983)

Rule 1.14 requires attorneys, insofar as is possible, to maintain a normal attorney-client relationship with a client whose ability to make adequately considered decisions is impaired.

Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings (American Academy of Matrimonial Lawyers)

1. Determination of "impaired or "unimpaired" children
 There is a rebuttable presumption that children age 12 and above are unimpaired. There is a rebuttable presumption that children below the age of 12 are impaired. Under this standard, the child's counsel, rather than the judge, is to make the judgment whether the child is impaired.

2. Representing "Unimpaired" Children

- a. Unless controlling law expressly indicates otherwise, counsel's role in representing an unimpaired child client is the same as when representing an unimpaired adult client.
- b. Unimpaired clients, regardless of age, have the right to set the goals of representation. Counsel for an unimpaired client should discuss the case with the child and counsel him or her with regard to the objectives of representation. Counsel is obliged to seek to attain the objectives of representation set by the client.
- c. When representing an unimpaired child, counsel should take appropriate measures to protect the child from harm that may be incurred as a result of the litigation by striving to expedite the proceedings and encouraging settlement in order to reduce trauma that can be caused by the litigation.

3. Representing "Impaired" Children

- a. When a child client, by virtue of his or her impairment, is unable to set the goals of representation, the child's lawyer shall not advocate a position with regard to the outcome of the proceeding or issue contested during the litigation.
- b. To the greatest extent feasible, counsel for an impaired child should maintain a normal attorney-client relationship. This child should include, whenever possible, advising the client of counsel's role and informing the client of all significant developments in the case. When communicating with the child client, counsel should use terms and concepts comprehensible to a child of the client's age and intellect.
- c. When representing an impaired child, counsel should take appropriate measures to protect the child from harm that may be incurred as a result of the litigation by striving to expedite the proceedings and encouraging settlement in order to reduce trauma that can be caused by the litigation.
- d. Counsel for an impaired child should use all appropriate procedures to adduce, develop and communicate facts which the decision-maker should consider in deciding the case and which otherwise would not be brought to the decision-maker's attention.
- e. Unless the child requests otherwise, counsel should take appropriate steps to make the court aware of the child's preferences.
- f. At the conclusion of a trial or hearing, counsel for an impaired child shall not make closing argument or submit a memorandum to the court.

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

Representing Children:

1. The attorney should use understandable language and questioning techniques, and should make all reasonable efforts to ensure that the client understands the court process and proceedings and the outcome of the proceedings. Special efforts should be taken to ensure that the client fully understands any court-approved case plan and that the case plan accurately reflects the court's orders.
2. The child's attorney should assist, and attempt to protect, the child in his or her role as a witness, including, if appropriate, requesting that testimony be taken in chambers.
3. The child's attorney should request, recommend and/or advocate for needed services for the child and make his or her best effort to see that those services are provided. This is particularly critical in cases of children with "special needs" and children approaching emancipation.

Representing Parents:

1. A parent's attorney has an ethical obligation to zealously represent the client's interests. This entails vigilant protection of the parents' right to raise their children as they think best without state interference.
2. Once the state has intervened, the law mandates family preservation and reasonable efforts and services to keep the family together. If desired by the client, the parent's attorney should advocate for appropriate reasonable services to preserve and reunify the family.
3. Where necessary and appropriate to protect the parents' interests, the parent's attorney should pay insist on formal court processes, and the attorney should pay scrupulous attention to procedural and evidentiary rules.
4. It is important that the attorney involve the parent in the decision-making process at each stage of the proceedings. At each stage the attorney should fully advise the parent of all the immediate and long-term consequences of any decision made.
5. The attorney should fully explain the case plan and court orders to the client and encourage timely compliance.
6. The attorney should be sensitive to any literacy and language limitations of the parents, and utilize interpreters where necessary.
7. Upon request, the attorney should provide legal assistance in accessing services.

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

Communication skills/knowledge of child development

1. Communicating with a child client may require efforts beyond those normally required for effective communications with adult clients.

2. Attorneys for children should be especially sensitive to the child's background and stage of development.
 - a. Knowledge of the basic stages of child development will help the attorney develop that sensitivity and age-appropriate communication skills.
3. An attorney for a child age four or older should interview the child to determine the child's wishes and assess the child's well-being.
4. Knowledge of child development will help the attorney to assess the need to seek expert assistance in a particular case and to understand the clinical evaluations that are so often a factor in dependency cases.

American Bar Association Center for Professional Responsibility, Model Rules of Professional Conduct (1983)

Rule 1.14 requires attorneys, insofar as is possible, to maintain a normal attorney-client relationship with a client whose ability to make adequately considered decisions is impaired.

See *American Bar Association Juvenile Justice Standards: Counsel for Private Parties* under Standard 2.3.

■ Commentary

Standards of Practice for Representing Children (Ann M. Haralambie)

It is suggested that the following principles be incorporated into any new standards:

1. The attorney's *subjective* view of the child's best interests in an inappropriate standard upon which to base a client's position.
2. A child capable of forming a reasonable position should be able to have that position advocated — otherwise *nobody* is presenting the child's position from the child's perspective.
3. The child's attorney should discuss the child's position and counsel the child about his or her position.
4. When the child's position would be *dangerous* for the child, and the attorney cannot dissuade the child from the position, the attorney should be authorized to take the minimally intrusive protective action.
5. When the child cannot form a reasonable position (which is not the same as a position the attorney thinks is in the child's best interests), the attorney should advocate a position based on an objective assessment of the child's best interests.
6. regardless of the position advocated, the child's expressed wishes should always be communicated to the court if the child wants them to be.

The following "presumptions and assumptions" should inform decisions regarding children's needs:

1. provision of basic needs;
2. provision and maintenance of nurturance, stability and contiguity, and the avoidance of unnecessary

disruptions that can interfere with the child's growth and development;

3. freedom from abuse or neglect;
4. maintenance of the family — this includes retaining ties among siblings and maintaining ties with biological fathers. In certain circumstances, it also includes at least considering the strong emotional bonds that may exist between a child and a nonbiological caretaker.

Further sources of information on which an attorney may make an informed, objective determination of children's needs:

1. evidence of the child's current desires;
2. opinions by persons such as teachers, counselors, baby-sitters, and neighbors about what the child will desire;
3. evidence of what similarly situated mature people wish had been advocated;
4. the child's separation behaviors when leaving each parent;
5. the child's pattern of asking for a particular person when the child is hurt, afraid, or in trouble;
6. expertise of appropriately qualified medical, mental health, and social work professionals to inform their position.

pp. 207-208. Primary debate since 1966 is whether attorney should decide what was in the child's best interests and advocate that, or whether attorney should be guided by the child's expressed views, even if the attorney felt they were not in the child's best interests.

pp. 211-215.—Proposed Paradigm Shift in Representation Standards. The author states that the attorneys subjective view of the child's best interests in an inappropriate standard upon which to base a client's position. The author sets forth objective criteria by which a child's position can be determined.

Independent Counsel for Children, Shannan L. Wilber, Family Law Quarterly

"[I]ndependent counsel should be appointed to represent children in any proceeding affecting their custody, placement or treatment. As a general rule, the attorney should advocate the wishes of the child—even if the attorney questions the correctness of the child's view. Only when the child is unable to articulate a reasoned preference should the attorney substitute a judgment for that of the client . . . The child's attorney is more than just a 'mouthpiece' for her client. The attorney provides additional functions which further undermine the notion that she is merely an extraneous figure. One critical function is the protection of the child from any unnecessary harm that may flow from the proceedings themselves. Parents engaged in a bitter custody battle or a protracted child abuse proceeding, for example, are often blind to the child's need for a prompt, harmonious resolution. Counsel for the child can oppose unnecessary continuances, move to quash frivolous motions, or request a court order

providing counseling or other supportive services for the child."

STANDARD 3.4 — Obligations Of Counsel Regarding Pre-trial Placement

When a child has been removed from the parent's home and placed in shelter care, counsel should advocate for the placement order and other temporary orders the client desires, unless the client is a child incapable of considered judgment, in which case, counsel should advocate for the placement order and other temporary orders that are in the best interests of the child.

■ Related Standards and Guidelines

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. The attorney should participate actively in the detention or shelter hearing.
2. Prevention of trauma to the child through needless separation from his/her family should be a goal of the child's attorney where appropriate.

■ Commentary

Standards of Practice for Representing Children (Ann M. Haralambie)

"The child's attorney should be creative in fashioning and considering the options available to the child. In most litigated cases the child's true best interests are not included among the available options. All available choices are usually less than ideal for the child, leaving the attorney to choose the 'least detrimental alternative.' The attorney should not be bound by the options suggested by other parties but should instead make an affirmative effort to fashion alternatives that will best suit the child's needs. The child's attorney is often the best person to propose a middle ground that will be acceptable to the parties."

STANDARD 3.5 — Initial Client Interview And Client Contact

Establishing and maintaining a relationship with the client is the foundation of the attorney-client relationship. Counsel should conduct an initial interview of the client within 72 hours and maintain regular contact with the client throughout the case.

■ Related Standards and Guidelines

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. The attorney, or his/her staff, should conduct thorough and complete interviews with the client, and at every stage of the proceedings should ensure that the attorney receives all new information from the client. In order to maintain an accurate assessment of the case, the attorney should conduct

follow-up interviews and phone calls to check on progress or changes of circumstance. The attorney, or his/her staff, should regularly phone or write the client in order to prepare the case and to help resolve problems which occur between hearings.

2. The attorney should initiate and answer all correspondence and telephone calls which are necessary to the effective representation of the client.
3. The attorney or his/her staff should interview the child, when developmentally appropriate, to ascertain the child's wishes, needs, and background. It is the attorney's responsibility to ascertain the child's version of the incident.
4. Interviews should be done in an atmosphere where the child feels comfortable and privacy is insured.
5. At the initial interview, where possible, the attorney should inform the child, in language the child can comprehend, of the nature of the proceedings, the role of a lawyer, the child's rights and confidentiality aspects where appropriate.
6. The attorney should attempt to remain on the case until termination of jurisdiction to insure continuity of representation.

Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1995)

C-1. Meet with Child

See *American Bar Association Juvenile Justice Standards: Counsel for Private Parties* under Standard 2.5.

■ Commentary:

Standards of Practice for Representing Children (Ann M. Haralambie)

"There are very few circumstances in which it would not be imperative to meet with the child, and I cannot think of any circumstances where it would hurt . . . Older children may be able to articulate their own needs quite accurately. Younger children may demonstrate their needs more through their behavior or emotions. Unless the child's attorney spends adequate time with the child on an ongoing basis, those needs may never be shown. It may be necessary to touch base with the parents or professionals involved with the child again after talking to the child. Therapists are particularly helpful resources in interpreting the child's behaviors and statements . . . Children, unlike adults, are not used to talking with people they do not know well. An attorney must establish at least some level of relationship with the child before the child is likely to say anything at all that will be useful. Major adjustments are necessary in one's usual interviewing techniques when children are involved. A good start is to begin thinking about 'talking with,' rather than 'interviewing,' the child . . . An attorney can do several things in the first meeting to convey important information to the child. First, the attorney should explain who he or she is and what the attorney's role in the case is. Young children in particular are not likely to remember and may have been

told erroneous information about your role by other people."

STANDARD 3.6 — Independent Investigation

Counsel should conduct a thorough, continuing and independent review and investigation of the case, including obtaining information, research and discovery in order to prepare the case for trial. Counsel should not rely solely on the report of the caseworker.

■ Related Standards and Guidelines

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. The attorney should have a complete familiarity with the facts of the case. This may involve reviewing the court file and other case-related documents, bringing discovery motions, interviewing witnesses, procuring experts and otherwise conducting an independent investigation.
2. The attorney, or his/her staff, is responsible for obtaining information regarding the parents' and Department of Children's Services' view of the case.
3. The complete legal file, whether an old or recently active case, should be reviewed.
4. Counsel shall investigate the interests of the minor beyond the scope of the juvenile proceeding and report to the court other interests of the minor that may need to be protected by the institution of other administrative or judicial proceedings.
5. The attorney should investigate what services were offered to the family to maintain the child in the home or prevent removal of the child from the home or to reunify the child with the family.
6. The attorney should consider whether a home visit to the client is appropriate and feasible.
7. The attorney should review relevant records and reports such as school records, medical records, court ordered evaluations and supplemental materials as soon as possible.

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

All attorneys should investigate as necessary to ascertain the facts, including interviewing of witnesses. Attorneys should not rely solely on the report of the social worker.

1. The attorney should determine the following from the client:
 - a. Extent of contact agency has had with parent/child prior to removal.
 - b. What services would have been helpful in avoiding removal.
 - c. If client is a parent or child, client's goals and concerns about placement and whether there are relatives or close family friends who would be willing to take child.

- d. If client is a parent and incarcerated, offense, length of incarceration, parent's plans after release, parenting/counseling and other programs available at prison; arrangements necessary to get parent to hearings.
 - e. If the client is a child, the attorney should:
 - i. Meet with child away from court setting and try to provide continuity and develop a trusting relationship. Explain, in age-appropriate language, the nature of the attorney-client relationship.
 - ii. Visit child in his/her home and observe child and child's interactions with others in the home. Assess the severity of the injuries and the child's general health and condition.
 - iii. Ask about and investigate resources that the child can think of, including relatives or friends.
 - iv. Regardless of the child's age, attempt to interview or at least observe the child. Observations are helpful in determining the accuracy of the petition and court report, or the statements of witnesses or parties.
 - v. Investigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child that may be protected by other administrative or judicial proceedings.
 2. The attorney should determine the following from the Agency Social Worker:
 - a. family's prior contacts with DSS
 - b. who made decision to remove child: child welfare worker or police
 - c. basis for removal, specific harms which removal was designed to prevent
 - d. alternatives to removal such as in-home services or removal of the perpetrator, and whether these services were considered prior to removal
 - e. contacts agency has made with parent and child since child was removed.
 3. The attorney should interview the following witnesses:
 - a. representatives of other agencies with whom the family has been involved, either through DSS referral or on the family's own initiative
 - b. persons who have had significant contact with the child and may have relevant information about the child.
 4. The attorney should obtain and review the agency's records. Where necessary, attorneys for parents and children should determine and utilize available discovery procedures. The attorney should look for:
 - a. Case plan
 - b. Services provided or requested by the family prior to the child's removal
 - c. Arrangements for visitation
 - d. Projected date of the child's return.
 5. The attorney should obtain and review all court pleadings, supporting documents, and necessary and relevant records (including medical, psychological, school, etc.).
 6. Attorneys should be familiar with local experts who can provide attorney with consultation and testimony on the reasonableness and appropriateness of efforts made to maintain the child in the home.
 7. The child's attorney should investigate as many placement alternatives as possible, appropriate to the child's situation and discuss these possibilities with the child.
 - a. Knowledge of community and other resources independent of the child's social worker will be helpful in this regard.
- Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1995)*
- C-2. Investigate
- (1) Review child's social services, psychiatric, psychological, drug and alcohol, medical, law enforcement, school, and other records relevant to the case.
 - (2) Review court files of child and siblings, case-related records of the social service agency and other service providers.
 - (3) Contact lawyers for other parties and nonlawyer guardians ad litem or court-appointed special advocates (CASA) for background information.
 - (4) Contact and meet with the parents/legal guardians/caretakers of the child, with permission of their lawyer.
 - (5) Obtain necessary authorization for the release of information.
 - (6) Interview individuals involved with the child, including school personnel, child welfare case workers, foster parents and other caretakers, neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses.
 - (7) Reviewing relevant photographs, video or audio tapes and other evidences.
 - (8) Attending treatment, placement, administrative hearings, other proceedings involving legal issues, and school case conferences or staffings concerning the child as needed.
- See *American Bar Association Juvenile Justice Standards: Counsel for Private Parties* under Standard 2.6.
- **Commentary**
- Standards of Practice for Representing Children (Ann M. Haralambie)*
- "Where the child's attorney is permitted to conduct discovery on behalf of the child, he or she should consider using all available discovery tools, both to obtain information not voluntarily provided and to limit the issues to be

litigated. Often the parties will voluntarily provide documents and permit interviews without formal discovery. However, formal discovery may be necessary with some professionals and with uncooperative parents."

STANDARD 3.7 — Pretrial Motions

Counsel should research, prepare, file and argue appropriate pretrial motions or responses whenever there is reason to believe the client is entitled to relief. Counsel should file briefs or memoranda in support of such motions or responses.

■ Related Standards and Guidelines

Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1995)

C-3. File Pleadings. Requested relief may include:

- (1) A mental or physical examination of a party or the child;
- (2) A parenting, custody or visitation evaluation;
- (3) An increase, decrease, or termination of contact or visitation;
- (4) Restraining or enjoining a change of placement;
- (5) Contempt for non-compliance with a court order;
- (6) Termination of the parent-child relationship;
- (7) Child support;
- (8) A protective order concerning the child's privileged communications or tangible or intangible property;
- (9) Request services for child or family; and
- (10) Dismissal of petitions or motions.

C-4. Request Services. Consistent with the child's wishes, the child's attorney should seek appropriate services (by court order if necessary). These services may include;

- (1) Family preservation-related prevention or reunification services;
- (2) Sibling and family visitation;
- (3) Child support;
- (4) Domestic violence prevention, intervention, and treatment;
- (5) Medical and mental health care;
- (6) Drug and alcohol treatment;
- (7) Parenting education;
- (8) Semi-independent and independent living services;
- (9) Long-term foster care;
- (10) Termination of parental rights action;
- (11) Adoption services;
- (12) Education;
- (13) Recreational or social services; and
- (14) Housing.

C.-5. Child with Special Needs. Consistent with the child's wishes, the child's attorney should assure that a child with special needs receives appropriate services to address the physical, mental, or developmental disabilities. These services may include, but should not be limited to:

- (1) Special education and related services;
- (2) Supplemental security income (SSI) to help support needed services;
- (3) Therapeutic foster or group home care; and
- (4) Residential/in-patient and out-patient psychiatric treatment.

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. The attorney should timely and appropriately file and respond to motions which would be important in the effective representation of the client. Before filing such motions, counsel must discuss with opposing counsel to resolve the issues.

STANDARD 3.8 —Negotiating A Settlement

Counsel should participate in settlement negotiations to seek expeditious resolution of the case and to obtain petition and disposition terms favorable to the client.

■ Related Standards and Guidelines

Representing Children: Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings (American Academy of Matrimonial Lawyers)

1. As a general rule, counsel for an impaired child should encourage settlement and should not undermine settlement efforts by the parties. In exceptional cases, where counsel reasonably believes that the court would not approve the settlement if it were aware of certain factors, counsel should bring those facts to the court's attention.

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. Counsel should be familiar with available mediation services.
2. Counsel should promptly communicate all terms and conditions of any offers of settlement to the client.

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

Jurisdiction Hearing: Adjudication Without Trial

1. If the attorney concludes, after full investigation and preparation, that the petition will probably be sustained, the attorney should so advise client and request consent to discuss settlement of case.
2. The attorney should keep client advised of all settlement discussions and communicate all proposals made by other parties.
3. The attorney should explore options to removal of child such as informal supervision, mediation, and intensive in-home services.

Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1995)

C-6 Negotiate Settlements. The child's attorney should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child. The child's attorney should use suitable mediation resources.

See *American Bar Association Juvenile Justice Standards: Counsel for Private Parties* under Standard 2.8.

■ **Commentary:**

Standards of Practice for Representing Children (Ann M. Haralambie)

"The child's attorney can conduct negotiation with the parents and their attorneys effectively by focusing on the needs of the child . . . In abuse cases, the child's attorney's recommendation of particular types of treatment (generally proposed initially by the therapist or evaluator in the case) as a means of regaining more time with the child and building a better parent-child relationship in the long-term may get the parent refocused on the child's needs in a positive way."

STANDARD 3.9 — Hearings

Counsel should be prepared before and during hearings to provide quality representation and advocacy for the client.

■ **Related Standards and Guidelines**

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. The attorney should be prepared to effectively argue the client's case in court including preparing for direct and cross examination, opening and closing arguments and, when appropriate, filing supporting trial briefs and points and authorities.
2. The attorney should evaluate what discovery is needed at each stage of the proceedings.
3. The attorney should request appropriate court orders at all hearings.
4. The attorney should determine if the child wishes to be present in court, and whether the child wishes to address the court in or out of the presence of other parties.

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

1. All attorney should be aware of the statutory requirements regarding time limits and continuances. They should also inquire into local hearing practices.
2. Where circumstances warrant, the attorney should promptly make any motions material to the protection of the client's rights, such as motions to dismiss

the petition, to suppress evidence, or for mental examination. Such motions should ordinarily be made in writing and should be scheduled for hearing prior to the jurisdiction hearing.

3. Detention Hearings

All attorneys should:

- a. Obtain copies of all relevant documents
- b. Interview the client
- c. Present facts and arguments regarding:
 - i. Jurisdictional sufficiency of allegations in petition
 - ii. The necessity of detention and whether reasonable efforts were made to prevent removal
 - iii. A plan for release of child prior to jurisdictional hearing or, if child remains in placement, arrangements for visits
- d. Explore options to detention of child such as informal supervision, mediation, and intensive in-home services.

4. Contested Jurisdiction Hearing

- a. Present all evidence relevant to the allegations in the petition obtained during the attorney's pretrial investigation.
- b. Attorneys should be familiar with those statutes that deal with children as witnesses. These may include statutes regarding:
 - i. excluding parents from the courtroom
 - ii. support persons in the courtroom for young children
 - iii. reasonable periods of relief from testifying
 - iv. age-appropriate questions and restriction of unnecessary repetition of questions
 - v. permission for leading questions in cases of child molestation
 - vi. exceptions to rules of evidence

Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1995)

D-1 Court Appearances The child's attorney should attend all hearings and participate in all telephone or other conferences with the court unless a particular hearing involves issues completely unrelated to the child.

D-2 Client Explanation The child's attorney should explain to the client, in a developmentally appropriate manner, what is expected to happen before, during and after each hearing.

D-3 Motions and Objections. The child's attorney should make appropriate motions, including motions *in limine* and evidentiary objections, to advance the child's position at trial or during other hearings.

D-4 Presentation of Evidence The child's attorney should present and cross examine witnesses, proffered exhibits, and provide independent evidence as necessary.

D-5 Child at Hearing In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify.

D-6 Whether Child Should Testify The decision on whether to call the child as a witness should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony of the child, and the child's developmental ability to provide direct testimony and withstand possible cross-examination. Ultimately, the child's attorney is bound by the child's direction concerning testifying.

D-7 Child Witness The child's attorney should prepare the child to testify. This should include familiarizing the child with the courtroom, court procedures, and what to expect during direct and cross-examination and ensuring that testifying will cause minimum harm to the child.

D-8 Questioning the Child The child's attorney should seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner.

D-9 Challenges to Child's Testimony/Statements The child's attorney should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility and, where appropriate, attempt to establish the competency and reliability of the child.

D-10 Jury Selection If a jury trial is possible, the child's attorney should participate in jury selection and drafting jury instructions.

D-11 Conclusion of Hearing If appropriate, the child's attorney should make a closing argument, and provide proposed findings of fact and conclusions of law. The child's attorney should ensure that a written order is entered.

D-12 Expanded Scope of Representation The child's attorney may request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. For example:

- (1) Child support
- (2) Delinquency or status offender matters
- (3) SSI and other public benefits
- (4) Custody
- (5) Guardianship
- (6) Paternity
- (7) Personal injury
- (8) School/education matters, especially for a child with disabilities
- (9) Mental health proceedings
- (10) Termination of parental rights; and
- (11) Adoption

STANDARD 3.10 — Disposition

Counsel should be prepared to present a disposition plan on behalf of the client, as well as to respond to inaccurate

or unfavorable information presented by other parties, ensuring that all reasonably available mitigating and favorable information is presented to the court and obtaining all appropriate orders to protect the client's rights and interests.

■ Related Standards and Guidelines

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. The attorney should try to familiarize herself/himself with the available resources for assisting clients in overcoming the problems which led to the Dependency Court proceeding or at least be able to insure that the client receives guidance in this area.
2. The child's attorney should independently evaluate the disposition plan and, where appropriate, offer alternative plans to the court.
3. The attorney should explore the possibility of placement with appropriate non-custodial parents and relatives.
4. When placement is an issue, the attorney should be aware of issues related to placement, including but not limited to:
 - a. the necessity of placement;
 - b. alternatives to placement;
 - c. relative placements;
 - d. the impact of removal and placement on the child;
 - e. the importance of placing siblings together when appropriate;
 - f. the appropriateness of the placement;
 - g. the efforts made to ensure a smooth, timely and appropriate transition to a new placement;
 - h. the effect of the placement on visitation by parents, siblings and other relatives;
 - i. the effect of placement on the service needs of the child;
 - j. the transracial, transcultural and language aspects of placement.
5. When siblings have been separated, the attorney should, when appropriate, advocate for reunification in order to reduce trauma and to keep part of the family intact.
6. When returning the child to the parent's home, the attorney should consider efforts to ensure a smooth, timely and appropriate transition.
7. The attorney should explore and argue for appropriate visitation orders between the child, parents, siblings and other relatives or significant persons.

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

Dispositional Hearing

1. The attorney should be familiar with dispositional alternatives and community services that might be useful in the formation of a dispositional plan.
2. The attorney should investigate all sources of evidence that will be presented at the hearing and interview material witnesses. The attorney also has an independent duty of investigate the client's circumstances, including such factors as previous history, family relations, economic condition and any other information relevant to disposition.
3. The attorney should seek to secure the assistance of psychiatric, psychological, medical or other expert personnel needed for purposes of evaluation, consultation or testimony with respect to formation of a dispositional plan. The attorney should inquire into local procedures for retention and appointment of experts.
4. Counseling of client prior to disposition:
 - a. The attorney should explain to the client the nature of the hearing, the issues involved, and the alternatives open to the court. He should also explain fully the nature, obligations and consequences of any proposed dispositional plan.
 - b. When psychological or psychiatric evaluations are ordered or arranged by the attorney prior to disposition, the attorney should explain the nature of the procedure and encourage the client's cooperation.
 - c. The attorney should examine fully any witness whose evidence is damaging to the client's interests and challenge the accuracy, credibility and weight of any reports or other evidence before the court.
 - d. When a dispositional decision has been reached, it is the attorney's duty to explain the nature, obligations and consequences of the disposition to the client, and the need for the client to cooperate with the dispositional orders.

Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1995)

D-13 Obligation after Disposition The child's attorney should seek to ensure continued representation of the child at all further hearings, including at administrative or judicial actions that result in changes to the child's placement or services, so long as the court maintains its jurisdiction.

See *American Bar Association Juvenile Justice Standards: Counsel for Private Parties* under Standard 2.10.

STANDARD 3.11 — Post-disposition

The lawyer's responsibility to the client does not end with dismissal of the petition or entry of a final dispositional order. Counsel should be prepared to counsel the client and provide or assist the client to secure appropriate

legal services in matters arising from the original proceeding.

■ Related Standards and Guidelines

Los Angeles County Issues Guidelines for Court Appointed Attorneys in Dependency Court

1. Attorneys should check on the timely implementation of orders for visitation, special needs services, counseling or other services.
2. If a child's attorney feels that a court's determination is contrary to the child's interests, a notice of rehearing or appeal should be considered to assure that the child's rights are protected.

Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1995)

E-1 Review of Court's Order The child's attorney should review all written orders to ensure that they conform with the court's verbal orders and statutorily required findings and notices.

E-2 Communicate the order to child

E-3 Implementation the child's attorney should monitor the implementation of the court's orders and communicate to the responsible agency and, if necessary, the court, any non-compliance.

See *American Bar Association Juvenile Justice Standards: Counsel for Private Parties* under Standard 2.11.

STANDARD 3.12 — Review Permanent Planning And Termination Of Parental Rights Hearings

Counsel's role is most critical at the review, permanent planning and termination of parental rights hearings, where decisions of whether the family will be reunited or permanently severed are made. Counsel should be fully prepared to represent the client at all reviews and must provide the most zealous and meticulous representation at the termination of parental rights stage of the proceedings.

■ Related Standards and Guidelines

Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties

Review Hearings

1. Planning for the hearing
 - a. All attorneys should confer periodically with their client and the social worker and review:
 - i. service plan
 - ii. extent of compliance with the plan
 - iii. continued appropriateness of plan
 - b. In monitoring the provision of dispositional services, the attorney should return the matter

to court if necessary to protect the client's interests.

- c. Attorneys should make sure they receive a supplemental report and a notice of the hearing from the social worker or probation officer at least 10 calendar days before the hearing.
2. At all review hearings, attorneys for all parties should present evidence relevant to the appropriateness of the child's continued dependency and placement, including but not limited to evidence regarding the provision of reasonable services and ensure that appropriate findings are made.

Rehearings

1. Orders of a referee may be reviewed by a judge of the juvenile court upon application by the child or parents or guardians.
2. A judge may also order a rehearing on the judge's own motion.

Writs\Appeals

1. All attorneys should advise their clients of their right to seek further judicial review by means of a writ or by appeal.

■ Commentary:

Standards of Practice for Representing Children (Ann M. Haralambie)

The child's attorney in a child abuse/neglect case frequently can be the most effective in advocating for the child outside of the trial or review hearing process.

The attorney should play an integral role in the case management or case review team, which is typically composed of at least the social worker and all professionals treating the family members. Multidisciplinary teams, either standing groups or groups convened for each particular case, are clearly the best way to treat child abuse/neglect cases in the legal system. If such a team is not already in place, the child's attorney should propose or convene one to assist with the case. A multidisciplinary team, with its members' varying experience and expertise, is necessary to fully appreciate the family dynamics and the needs of the child and his or her family and to fully explore placement and treatment options.

Especially if the child is in an out-of-home placement, the attorney should insist on thorough review of the child's case and speedy creation and implementation of a case plan to provide services that will enable the child to be returned home as soon as possible or a permanent plan for out-of-home care if return home is not feasible . . .

Caseworkers are almost always overburdened, and the attorney who actively advocates for services for a child client, being the squeaky wheel, stands a good chance of moving the client's case higher on the caseworker's priority list."

Performance Standards

Chapter 4 Specific Standards For Representation *In Civil Commitment Proceedings*

STANDARD 4.1. — Pre-requisites For Representation

In addition to being proficient in substantive and procedural law, counsel should possess knowledge, skill, training and experience commensurate with the nature of the allegations and the complexity of the case.

STANDARD 4.2. — Counsel's Role

It is counsel's role to act as a zealous advocate for the client's ultimate goals and objectives in the commitment proceedings and to advise the client on how best to achieve them.

STANDARD 4.3. — Initial Client Interview

Upon being retained or appointed by the court, counsel should conduct an initial interview with the client as soon

as possible, in most cases within 24 hours, but in all cases prior to the hearing.

STANDARD 4.4. — Obligations Of Counsel Pre-hearing

Counsel should obtain documents filed in the case, review reports and records of relevance, prepare pre-trial motions and engage in negotiations at the client's direction.

STANDARD 4.5. — Commitment Proceedings

Counsel should provide quality representation and advocacy for the client at commitment proceedings.

STANDARD 4.6. — Obligations Of Counsel Post-hearing

It is counsel's responsibility to represent or obtain representation for any residual legal matters relating to the case.

